

Supreme Court, U. S.

FILED

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In the Supreme Court of the United States

October Term, 1975

No. **75-554**

FRANK S. BEAL, Individually and as Secretary of the Department of Public Welfare, Commonwealth of Pennsylvania; ROGER CUTT, Individually and as Assistant Deputy Secretary for Medical Services, Commonwealth of Pennsylvania; GLENN JOHNSON, Individually and as Chief of the Bureau of Medical Assistance, Commonwealth of Pennsylvania; EDWARD KALBERER, Individually and as Executive Director of the Allegheny County Board of Assistance; and THE DEPARTMENT OF PUBLIC WELFARE, OF THE COMMONWEALTH OF PENNSYLVANIA,

Petitioners

v.

ANN DOE; BETTY DOE, a Minor, by Her Mother as Representative, Mother B. Doe; CATHY DOE; DONNA DOE, a Minor, by Her Mother as Representative, Mother D. Doe; ELAINE DOE; JANE DOE, a Minor, by Her Father as Representative, Father J. Doe; NANCY DOE; PATRICIA DOE; RUTH DOE; SYLVIA DOE; and TONI DOE, Each Individually and on Behalf of All Other Women Similarly Situated,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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TABLE OF CONTENTS

	PAGE
Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit:	
I. Opinions Below	1
II. Jurisdiction	2
III. Question Presented	3
IV. Statement of the Case	4
V. Reasons for Granting the Writ:	
A. The opinion of the Court below is in direct conflict with opinions rendered by other circuit courts regarding the validity of sim- ilar regulations under Title XIX of the So- cial Security Act	7
B. The question presented in this case is a mat- ter of great public concern	15
C. Resolution of the conflict among the cir- cuit courts will necessarily result from ju- dicial review of this case	17
VI. Conclusion	18
Appendix:	
Opinion, United States District Court for the West- ern District of Pennsylvania	1a
Order	41a
Dissenting Opinion	42a
Supplemental Order	50a

Opinion, United States Court of Appeals for the Third Circuit Dated Dec. 10, 1974	52a
Concurring Opinion	57a
Judgment	59a
Opinion, United States Court of Appeals for the Third Circuit Dated July 21, 1975	60a
Dissenting Opinion	89a
Judgment on Rehearing	118a
Dissenting Opinion, Adams, Circuit Judge ..	120a

TABLE OF CITATIONS

CASES:

Dandridge v. Williams, 397 U.S. 471 (1970)	9, 17
Doe v. Rose, 499 F. 2d 1112 (10th Cir. 1974) ..	7, 11
F.T.C. v. Jantzen, Inc., 386 U.S. 228 (1966)	15
Hamar Theatres, Inc. v. Cryan, 365 F. Supp. 1312 (D.N.J. 1973)	13, 14
Jefferson v. Hackney, 406 U.S. 535 (1972)	9, 17
McGee v. International Life Insurance Co., 355 U.S. 220 (1957)	16
Mitchell v. Donovan, 398 U.S. 427 (1970)	5
Moor v. County of Alameda, 411 U.S. 693 (1973) ...	13
N.Y.S. Department of Social Services v. Dublino, 413 U.S. 405 (1973)	13, 17
Ries v. Lynskey, 452 F. 2d 172 (7th Cir. 1971) ...	13
Roe v. Ferguson, 515 F. 2d 279 (6th Cir. 1975)	7, 10, 11

Roe v. Norton, 380 F. Supp. 726 (D. Conn. 1974), F. 2d , Docket No. 74-1874 (2nd Cir. July 31, 1975)	7, 11, 12, 14
Roe v. Wade, 410 U.S. 113 (1973)	13
Rothensies v. Electric Battery Co., 329 U.S. 296 (1956)	15
Singleton v. Wulff, U.S. , No. 74-1393, June 23, 1975	16
The Monrosa v. Carbon Black, Inc., 369 U.S. 180 (1958)	17
United States v. Rothberg, 480 F. 2d 534 (2d Cir. 1973)	13
United States v. Wise, 370 U.S. 405 (1962)	13

STATUTES:

28 U.S.C. §1254(1)	2
28 U.S.C. §1343 et seq.	8
42 U.S.C. §1396 et seq. ...3, 4, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 17	
42 U.S.C. §1983	8

UNITED STATES CONSTITUTION:

Fourteenth Amendment	5, 8, 9, 12
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OTHER AUTHORITY:

R. Stern & E. Gressman, Supreme Court Practice (4th ed. 1969)	14
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-

FRANK S. BEAL, et al.,

Petitioners

v.

ANN DOE, et al.,

Respondents

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT**

Frank S. Beal, Secretary of the Department of Public Welfare, Commonwealth of Pennsylvania, *et al.*, hereby petition that a Writ of Certiorari issue to review the judgment of the United State Court of Appeals for the Third Circuit entered in this case on July 21, 1975.

I. OPINIONS BELOW

The opinion of the District Court is reported at 376 F. Supp. 173, and is printed in the Appendix, pp. 1a-51a. The initial opinion of the Court of Appeals dated Decem-

ber 10, 1974, is not officially reported and is printed in the Appendix, pp. 52a-59a. The majority and dissenting opinions of the Court of Appeals *en Banc* dated July 21, 1975 are not yet officially reported and are printed in the Appendix, pp. 60a-88a, and pp. 89a-120a respectively.

II. JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on July 21, 1975. App. pp. 86a-88a. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

III. QUESTION PRESENTED

This petition raises the question of whether the Commonwealth of Pennsylvania is required under the terms of Subchapter XIX of the Social Security Act, 42 U.S.C. §1396 *et seq.*, hereinafter referred to as Title XIX, to provide Medicaid funds for the costs of non-therapeutic abortions. The Court of Appeals for the Third Circuit *en Banc* decided that such a requirement is inferentially within Title XIX, two Circuit Court holdings to the contrary notwithstanding. Therefore, the following question is presented:

Whether Title XIX of the Social Security Act, 42 U.S.C. §1396 *et seq.* requires that states which participate in the federal-state Medicaid Program, such as the Commonwealth of Pennsylvania provide Medicaid funds for the costs of non-therapeutic abortions?

STATEMENT OF THE CASE

The Commonwealth of Pennsylvania is a participant in the federal-state medical assistance program established under Title XIX of the Social Security Act, 42 U.S.C. §1396 *et seq.* As such the Commonwealth through its Department of Public Welfare has formulated a State Medicaid Plan which generally establishes the criteria under which eligibility for state and, in varying amounts, federal subsidization of the costs of medical services is determined. In short, the federal law has established only the broad parameters of the Medicaid Program . . . which provides for payment of "the costs of necessary medical services. . ."¹ Accordingly the Commonwealth of Pennsylvania has established, by its state plan, the level of need requisite to receiving benefits under the program.

As an integral part of this program the Pennsylvania Medicaid Program provides for reimbursement of the reasonable costs of abortions. The only requirements that an eligible participant must meet in order to have the reasonable costs of the abortion reimbursed from Medicaid funds are that the abortion must be medically necessary to protect the health of the mother, and that it be performed in accord with established medical procedures. These requirements are, of course, not unique to the abortion procedure but in fact such requirements exist for all medical services under the Pennsylvania Medicaid Plan. Finally it should be noted that Pennsylvania's Medicaid Plan has been approved by the Secretary of Health, Education and Welfare.

¹ 42 U.S.C. §1396a.

The plaintiffs in this action were pregnant women who were then financially eligible for medical assistance in Pennsylvania. All of the plaintiffs desired abortions that were, by their own admission, not medically necessary, but rather these plaintiffs desired their abortions for reasons of general convenience. In order to compel the defendant Department of Public Welfare of the Commonwealth of Pennsylvania to pay the costs of these abortions the plaintiffs instituted this action on October 3, 1973. The plaintiffs generally asserted by way of their civil rights action that Pennsylvania's medical assistance regulations regarding abortions were, in the first instance, invalid as being inconsistent with the Social Security Act, and alternatively that they violated the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

On May 3, 1974 by majority opinion of the Federal District Court for the Western District of Pennsylvania held that these Medicaid regulations, while being consistent with the Social Security Act, violated the Fourteenth Amendment as applied in the first trimester of pregnancy (App. 1a-40a). Both sides then appealed this decision to the Court of Appeals for the Third Circuit.² After argument before a panel of three circuit judges, on December 10, 1974 the District Court was sustained for reasons not related to the merits of the case (App. 53a-59a). Both sides then petitioned for, and were granted,

² Plaintiffs chose to appeal only from the denial of declaratory relief in the second trimester of pregnancy, and not the Court's refusal to grant any permanent injunctive relief. And, of course, the defendants could only appeal the adverse declaratory judgment, thus jurisdiction over the appeal was properly in the Circuit Court, *Mitchell v. Donovan*, 398 U.S. 427 (1970).

rehearing before the Court of Appeals *en Banc* and this opinion by the Court of Appeals was vacated.³

Reargument before the Court of Appeals *en Banc* was held on May 8, 1975. As will be discussed more fully later, the Court of Appeals disagreed with the District Court and held that Pennsylvania's Medicaid abortion regulations were invalid as being inconsistent with Title XIX of the Social Security Act. Having thus held, the Court of Appeals properly did not address the constitutional challenge raised by the plaintiffs, hereinafter referred to as respondents. It is from this decision that the defendants, hereinafter referred to as petitioners, seek a writ of certiorari. And it is of this opinion that petitioners seek review in this Court.

³ While no mention of defendants' petition for rehearing is found in the Appeals Court's final opinion such a petition was filed with the Court by defendants on December 24, 1974.

REASONS FOR GRANTING THE WRIT

A. The Opinion of the Court Below Is in Direct Conflict With Opinions Rendered by Other Circuit Courts Regarding the Validity of Similar Regulations Under Title XIX of the Social Security Act

Consistent with what was done in various other states,⁴ and in accord with local recognized medical standards, the Commonwealth of Pennsylvania, through its Department of Public Welfare adopted certain standards of eligibility for reimbursement of the medical costs of abortions. These standards, often referred to as "medical necessity" standards, provide that abortions will be subsidized under the medical assistance program only in the following situations:

1. There is documented medical evidence that continuance of the pregnancy may threaten the health of the mother;
2. There is documented medical evidence that an infant may be born with incapacitating physical deformity or mental deficiency; or
3. There is documented medical evidence that continuance of a pregnancy resulting from legally established statutory or forcible rape or incest, may constitute a threat to the mental or physical health of a patient; and

⁴ See *Roe v. Ferguson*, 515 F. 2d 279 (6th Cir. 1975); *Doe v. Rose*, 499 F. 2d 1112 (10th Cir. 1974); and *Roe v. Norton*, F. 2d , Docket No. 74-1874 (2nd Cir. July 31, 1975).

4. Two other physicians chosen because of their recognized professional competency have examined the patient and have concurred in writing; and

5. The procedure is performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals. (See n. 1 at App. 2a.)

The respondents brought this action under 28 U.S.C. §1343(3) and (4) and rested their claims on the Civil Rights Act, 42 U.S.C. §1983. By this action the respondents attacked Pennsylvania's Medicaid standards for abortions on two general fronts. First they asserted that these standards were inconsistent with requirements of Title XIX of the Social Security Act. Secondly, the respondents contended that these abortion standards violated the Equal Protection Clause of the Fourteenth Amendment.

As to the respondents' first contention the District Court held, and petitioners suggest quite correctly, that Pennsylvania's standards were not inconsistent with Title XIX of the Social Security Act (App. 18a-26a). The trial court accepted, at least *arguendo*, respondents' arguments in this regard by noting that while under certain sections of the act "... abortion payments are clearly authorized"⁵ but the court noted, this was not the end of the inquiry. The pivotal question is not whether or not Pennsylvania is authorized to make such payments but rather "[w]hether or not Pennsylvania may, by means of its Regulations and/or Procedures, determine when the performance of an abortion becomes a medical necessity?" (App. 23a) In other words, is Pennsylvania *required* to establish, as part of its medical assistance program, a level

⁵ App. 22a. (Emphasis added.)

of medical necessity that would include payments for non-therapeutic abortions?

For its answer the District Court relied on various holdings of this Court including *inter alia*, *Jefferson v. Hackney*, 406 U.S. 535 (1972), and *Dandridge v. Williams*, 397 U.S. 471 (1970), for the settled proposition that the states have been given great latitude in establishing standards for the administration of their assistance programs under Title XIX. The District Court noted also that Congress was silent as to the specific authorization, not to mention *requirement*, of payment under Medicaid for non-therapeutic abortions. Accordingly, the trial court held that:

"... Pennsylvania standards must be scrutinized without curtailment by Congressional action and the State Regulations and/or Procedures must be given great latitude in providing for the administration of the Program. We, therefore, feel compelled to find Pennsylvania's Regulations do not conflict with Title XIX of the Social Security Act." (App. 26a)⁶

Both sides took appeals from this decision to the Court of Appeals for the Third Circuit. The Court of Appeals *en Banc* rejected the reasoning of the District Court and held that petitioners' abortion standards violated the *implied* requirements of Title XIX.⁷ In so holding the

⁶ As noted earlier, the District Court with Circuit Judge Weis dissenting, did go on to hold that Pennsylvania's standards regarding Medicaid payments for abortions were unconstitutional as to the first trimester of pregnancy only, and thus were in violation of the Equal Protection Clause of the Fourteenth Amendment.

⁷ Circuit Judges Kalodner, Gibbons, and Adams dissented, see App. 89a-120a.

Court clearly recognized that its decision was in direct conflict with two other Circuit Court opinions as follows:

"In reaching the above conclusion, we are not unmindful that other courts have found state provisions like Pennsylvania's to be consistent with the Statutory scheme. In *Roe v. Ferguson*, 43 U.S.L.W. 2452 (6th Cir. No. 74-2195, Apr. 28, 1975), the Sixth Circuit reversed a district court's holding that Title XIX requires state funding for elective abortions. The court wrote:

'There is no indication that Congress intended to require the furnishing of abortion services not required for the preservation of the health of the woman at a time when the performance of such abortions was illegal in most jurisdictions. In view of the disfavor shown toward abortions in other legislation, we are reluctant to infer that Congress intended to include required coverage for such controversial services without even mentioning the subject. When Congress passed the Family Planning Services and Research Act of 1970, 42 U.S.C. §§300a et seq., providing funds to states opting to participate in creating comprehensive programs of family planning services, abortion was specifically excluded as a means of family planning to be recognized under the Act. 42 U.S.C. §300a-6.

'In establishing the Legal Services Corporation system, Congress again provided that no funds of the Corporation could be used for legal assistance for those seeking to procure a non-therapeutic abortion. 42 U.S.C. §2996f(b)(8).' [Cite omitted.]

"See also *Doe v. Rose*, *supra* at 1114-15 ('prefer (ring)' to decide the case on constitutional grounds in light of the Act's silence on the abortion question); *Doe v. Wohlgemuth*, *supra*. We find none of these arguments to be persuasive. . . ." (App. 84a-85a)

The Court of Appeals was certainly correct that its opinion was in direct conflict with holdings of the Courts of Appeals in *Roe v. Ferguson*⁸ and *Doe v. Rose*.⁹ In both of these cases we find factual situations and legal contentions that are indistinguishable from those that are present in this case. In both cases pregnant women, *inter alia*, otherwise eligible in their respective states for medical assistance, sought state reimbursement for non-therapeutic abortions. In *Ferguson*, Ohio law prohibited the use of state or local funds to pay for any abortions unless the abortion was necessary to preserve the physical or mental health of the pregnant woman, *Ferguson, supra* at 279-80. And similarly in *Rose*, the Director of the Utah State Department of Social Services established a policy which prohibited the expenditure of Medicaid funds for non-therapeutic abortions. And, as the Court of Appeals in this case noted, both of those cases resulted in findings by the respective Circuit Courts that such regulations do not contravene the mandate of Congress as expressed in Title XIX.

Further, the Circuit Court in this case placed strong reliance for judicial authority for its opinion on the case of *Roe v. Norton*, 380 F. Supp. 726 (D. Conn. 1974). Again, the *Norton* case is indistinguishable from the case *sub judice*. In *Norton* a regulation of Connecticut's Welfare Department that extended Medicaid coverage to only

⁸ *Roe v. Ferguson*, 515 F.2d 279 (6th Cir. 1975).

⁹ *Doe v. Rose*, 499 F.2d 1112 (10th Cir. 1974).

therapeutic abortions was challenged as being violative of Title XIX of the Social Security Act and, in the alternative, as violating *inter alia* the Equal Protection Clause of the Fourteenth Amendment. While the District Court in that case did hold that those regulations violated the terms of the Social Security Act, the Court of Appeals' reliance on this holding was misplaced.

Ten days after the opinion in this case was handed down the Second Circuit Court of Appeals reversed the District Court in *Norton*.¹⁰ Indeed the Second Circuit held correctly, and in direct conflict with the opinion in this case, as follows:

"We disagree with the court below insofar as it held that Title XIX prohibits state regulations such as Section 275 which deny Medicaid coverage for elective abortions. In our view, while Title XIX permits federal reimbursement for elective abortions, it does not *forbid* state regulations limiting Medicaid payments for abortions to those which are therapeutically necessary for the health of the pregnant woman. This construction of the statute is in accord with the view expressed by H.E.W. on this appeal. [Note omitted.]

"When Congress enacted Title XIX in 1965, abortions which were not therapeutically necessary either for the life or health of the pregnant woman, were unlawful in most states. As late as 1973, 31

¹⁰ *Roe v. Norton*, F.2d (Docket No. 74-1874, 2nd Cir. July 31, 1975). See n. 6 at 5304 of that opinion where it is apparent that the *Norton* Court was not aware of the decision in this case. Notwithstanding this it is clear that that Court discussed and rejected most, if not all, of the arguments which form the basis for Appeals Court's decision in this case.

states had statutes on the books forbidding the performance of elective abortions. *Roe v. Wade*, *supra*, 410 U.S. 118, n. 2. It was not until some eight years after the passage of Title XIX that *Roe v. Wade*, *supra*, and *Doe v. Bolton*, *supra*, held that such state legislation, at least in the first trimester of pregnancy, was unconstitutional. During those eight years the abortion question in its various aspects was highly controversial.

"The court below did not point to any provision of Title XIX which prohibits state regulations denying Medicaid coverage for elective abortions. There is certainly no mention of abortion or abortion services in Title XIX. A thorough combing of the statute does not lead us to any language which directly or inferentially can be construed as prohibiting state regulations such as Section 275.

"Moreover, no intention to prohibit state regulations of that nature can be ascribed to Congress. There is no legislative history to support the view that by enacting Title XIX Congress intended to prohibit states from denying Medicaid coverage for elective abortions.

"A statute must be construed with reference to the circumstances existing at the time of its passage and in the light of the conditions under which Congress acted at the time. *Moor v. County of Alameda*, 411 U.S. 693, 709 (1973); *United States v. Wise*, 370 U.S. 405, 411 (1962); *United States v. Rothberg*, 480 F.2d 534, 535 (2d Cir. 1973); *cert. denied*, 414 U.S. 856 (1973); *Ries v. Lynskey*, 452 F.2d 172, 175 (7th Cir. 1971). *Cf. Department of Social Services v. Dublino*, 413 U.S. 405 (1973); *Hamar*

Theatres, Inc. v. Cryan, 365 F. Supp. 1312 (D. N.J. 1973) (three-judge court), vacated and remanded for consideration of mootness, 419 U.S. 1085 (1974). In the light of the circumstances and conditions at the time the statute was enacted, the absence of any language in the statute regarding the subject, and the lack of legislative history indicating a contrary position, it cannot be supposed that Congress, in 1965 intended to or did impose a requirement that states must provide coverage for elective abortions when the criminal statutes of the majority of the states forbade the performance of such abortions." *Roe v. Norton*, *supra* at 5305-7.

In view of the foregoing discussion and authorities it is manifest that there presently exists a direct conflict among various circuit courts over the same question of federal law, specifically whether or not Title XIX of the Social Security Act mandates that the states pay the costs of abortions sought for reasons of convenience *vis-a-vis* reasons of health. It would be inappropriate at this point to elaborate with any more specificity the reasons why petitioners contend that the decision below is in error at this time.¹¹ However, in concluding this section of the petition it is strongly urged that your petitioners presently stand aggrieved by the decision of the court below, and consequently by the conflict of federal law that has thus been created.

¹¹ R. Stern & E. Gressman, *Supreme Court Practice*, 207, §641 (4th ed. 1969).

B. The Question Presented in This Case Is a Matter of Great Public Concern

The conflict of the circuits that has been set forth in the preceding section of this petition arises out of a controversy that is presently of great public concern, and, as such, involves an important question of federal statutory construction. As has already been pointed out, this controversy has been specifically addressed by four circuit courts and numerous district courts.¹² And it goes without saying that the lives of thousands, if not millions, of persons will necessarily be affected by the outcome of this lawsuit.

It is clear from the majority and dissenting opinions below that the issue raised by this suit involves a substantial question of statutory construction. Further, review of this decision by this court will necessarily resolve a presently existing conflict between those charged with the administration of the Social Security Act and the lower court in this case. See *Rothensies v. Electric Battery Co.*, 329 U.S. 296, 299 (1956); *F.T.C. v. Jantzen, Inc.*, 386 U.S. 228, 229 (1966). The dissenting opinion below very clearly points out the majority's disagreement with the position formally taken by responsible federal officials on the question of whether Title XIX requires Medicaid payments for non-therapeutic abortions, as follows:

"Coming now to the majority's disregard of the views expressed by the Solicitor General of the United States, and the federal agency which administers the

¹² See n. 4, *supra*.

Medicaid program, on the score of the reach of Title XIX, in its holding that 'the Pennsylvania Regulations are inconsistent with Title XIX':

"As already stated, the Solicitor General in his Amicus Curiae Memorandum [note omitted] specifically opined that 'the Social Security Act does not require a federally funded state medicaid program to pay for abortions that are not medically indicated', and, the federal agency which administers the Medicaid program, in a statement on its 'position' on abortion, [note omitted] made it clear that a Medicaid state has the option of funding abortions, and if it does, 'the federal Government shares with the State.'" App. 102a-103a.

Thus the conflict has gone beyond the confines of the judicial branch. It is submitted that unless and until this very important question of federal law is resolved by this Court a state of confusion on this issue will exist in the judicial and executive branches of the Federal Government, as well as in many other states with similar Medicaid regulations. *McGee v. International Life Insurance Co.*, 355 U.S. 220 (1957). Furthermore, there is presently pending no case on this Court's docket, of which petitioners' counsel is aware, wherein this issue will be resolved.¹³

¹³ This Court has by order dated June 23, 1975 granted certiorari in the case of *Singleton v. Wulff*, No. 74-1393 which case arose from similar factual and legal bases as the case *sub judice*. However, presumably because of the rather unusual procedural history of the *Singleton* case this Court has expressly limited its review to: (1) the standing of the respondent-physicians; and (2) whether the Court of Appeals exceeded its jurisdiction by proceeding to decide the constitutionality of similar abortion regulations before the District Court had dealt with the issue.

C. Resolution of the Conflict Among the Circuit Courts Will Necessarily Result From Judicial Review of This Case

As set forth at the outset of this petition the respondents have challenged Pennsylvania's Medicaid standards regarding abortion on two separate levels, statutory and constitutional. And while the petitioners at the trial level did raise a question as to the respondents' standing, this issue was intentionally forsaken on appeal. Thus the only issues before the Court of Appeals were (1) whether or not Title XIX required Medicaid payment for non-therapeutic abortions; and, if not, (2) whether the Equal Protection Clause required such payment. Having held in favor of respondents on the first claim, of course the Court of Appeals properly never dealt with the constitutional question. Thus, as the record presently stands there are no other issues in the case which, if decided one way or the other by this Court, could dispose of the controversy without resolving the obvious conflict among the circuit courts. This is but another way of stating that the issue out of which the conflict has arisen is presently the only and decisive issue in the case.

The decision below cannot be sustained without a finding by this Court that Title XIX of the Social Security Act mandates payment by the participating states of Medicaid funds for non-therapeutic abortions. *The Monrosa v. Carbon Black, Inc.*, 359 U.S. 180 (1958). Moreover such a holding by this Court would sanction the lower court's erroneous application of this Court's holdings in *Dandridge v. Williams*, 397 U.S. 471 (1970); *Jefferson v. Hackney*, 406 U.S. 535 (1971); and *N.Y.S. Department of Social Services v. Dublino*, 413 U.S. 405 (1972).

If one principle stands out among all others in these holdings it is that, within the context of the Social Security Act, congressional mandates must not lightly be inferred by the courts, but rather, such mandates must be clearly expressed by Congress. This principle was completely rejected by the lower court in this case, and must be, by this Court in order to affirm that court. Thus this Court should review the Court of Appeals decision in this case in order to rectify the confusion that has resulted from that decision.

VI.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should grant the Petition for Writ of Certiorari in this case to review the judgment of the Court of Appeals for the Third Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of October, 1975, three typed copies of this Petition for a Writ of Certiorari were sent by United States mail, first class, postage prepaid to the office of R. Stanton Wettick, Esquire, Neighborhood Legal Services Association, 535 Fifth Avenue, 310 Plaza Building, Pittsburgh, Pennsylvania 15230.

I further certify that all parties required to be served have been served.

NORMAN J. WATKINS
Deputy Attorney General

Department of Justice
Capitol Annex Building
Harrisburg, Pa. 17120

APPENDIX

**IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF PENNSYLVANIA**

Civil Action No. 73-846

Ann Doe; Betty Doe, a minor, by her mother as representative, Mother B. Doe; Cathy Doe; Donna Doe, a minor, by her mother as representative, Mother D. Doe; Elaine Doe; Jane Doe, a minor, by her father as representative, Father J. Doe; Nancy Doe; Patricia Doe; Ruth Doe; Sylvia Doe; and Toni Doe, each individually and on behalf of all other women similarly situated,

Plaintiffs,

vs.

Helene Wohlgemuth, individually and as Secretary of the Department of Public Welfare, Commonwealth of Pennsylvania; Roger Cutt, individually and as Assistant Deputy Secretary for Medical Services, Commonwealth of Pennsylvania; Glenn Johnson, individually and as Chief of the Bureau of Medical Assistance, Commonwealth of Pennsylvania; Edward Kalberer, individually and as Executive Director of the Allegheny County Board of Assistance; and the Department of Public Welfare, of the Commonwealth of Pennsylvania,

Defendants,

Before: Weis, Circuit Judge, Sorg, District Judge and
Snyder, District Judge

OPINION AND ORDER

SNYDER, District Judge

The Plaintiffs, as welfare recipients and participants in the Pennsylvania Medical Assistance Program (PMAP), have filed their Complaint on behalf of themselves and all others similarly situated against the Pennsylvania Department of Public Welfare (Department) and certain of its Officers and/or Administrative Representatives. They challenge the State of Pennsylvania's refusal to provide reimbursement for the cost of abortions which they sought to have performed at Magee-Womens Hospital, Pittsburgh, Pennsylvania. The Department's Procedures hold that abortions may be performed under the PMAP only in the following situations:¹

"1. There is documented medical evidence that continuance of the pregnancy may threaten the health or life of the mother;

2. There is documented medical evidence that the infant may be born with incapacitating physical deformity or mental deficiency; or

3. There is documented medical evidence that a continuance of a pregnancy resulting from legally established statutory or forcible rape or incest, may constitute a threat to the mental or physical health of a patient;

¹ While neither Counsel for the Plaintiffs nor for the Department referred this Court to a governing regulation, it was agreed that the above set forth criterion as excerpted from an Opinion Letter of the Attorney General dated August 6, 1973, correctly stated the requirements.

4. Two other physicians chosen because of their recognized professional competency have examined the patient and have concurred in writing; and

5. The procedure is performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals."

Jurisdiction was claimed under 28 U.S.C. §§1343 (3)² and (4)³ as derived from 42 U.S.C. §1983.⁴ The Plaintiffs claim that Title XIX of the Social Security Act requires reimbursement of physicians and hospital services for abortions which they elect; and they further claim the unrestricted right of such reimbursement under the Equal Protection Clause of the Fourteenth Amendment and the right to privacy as recognized in *Roe v. Wade*, 410 U.S. 113, 93

² Section 1343: "Civil rights and elective franchise

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;"

³ "(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

⁴ Section 1983: "Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

S.Ct. 705, 35 L.Ed.2d 147 (1973) *rehearing denied* 410 U.S. 959, 93 S.Ct. 1409, 35 L.Ed.2d 694.

After hearing, the District Court on October 9, 1973, granted a Preliminary Injunction directing the Defendants to pay the reasonable costs of medical services rendered for any abortion performed in Allegheny County, Pennsylvania (as requested by the Plaintiffs) by a licensed physician on a woman otherwise eligible for PMAP benefits without additionally meeting the criterion hereinabove set forth.

On the same date, the Court filed an Order requesting the convening of a Three Judge Court, as there appeared to be a substantial constitutional question as to whether the Department's State-wide Regulations and Procedures were consistent with the Social Security Act or operated to deny the Plaintiffs equal protection of the law. See: *U.S. Dept. of Agriculture, et al. v. Jacinta Moreno*, U.S. , 93 S.Ct. 2821, 37 L.Ed.2d 782 (1973); *Wilwording v. Swenson*, 404 U.S. 249, 92 S.Ct. 407, 30 L.Ed.2d 418 (1971); *King v. Smith*, 392 U.S. 309, 88 S.Ct. 2128, 20 L.Ed.2d 1118 (1968); *Charleston v. Wohlgemuth*, 332 F. Supp. 1175 (E.D. Pa. 1971) *affirmed* 405 U.S. 970, 92 S.Ct. 1204, 31 L.Ed.2d 246. Determination of the Class was referred to the Three Judge Court. On October 12, 1973, Chief Judge Collins J. Seitz of the Third Circuit duly ordered the empaneling of the Three Judge Court. On October 25, 1973, the Defendants filed an Answer which denied that the Plaintiffs had standing to sue, that the Court had subject matter jurisdiction over the cause of action, and that the Plaintiffs' Complaint stated a cause of action for which relief could be granted.

A distillation of the PMAP shows that Pennsylvania is a participating State in a cooperative plan for providing re-

imbursement for medical services to the indigent under the Social Security Act (42 U.S.C. §1396 *et seq.*) The Act makes provision for medical services to the "categorically needy" (42 U.S.C. §1396a(a)(13), 45 CFR 249.10(a)(1)), or to the "medically needy" (42 U.S.C. §1396a(a)(10)(B), 45 CFR 249.10(a)(2)). Pennsylvania provides services to the "medically needy". 62 P.S. §441.1 reads as follows:

"The following persons shall be eligible for medical assistance:

(1) Persons who receive or are eligible to receive cash assistance grants under this article;

(2) Persons who meet the eligibility requirements of this article for cash assistance grants except for citizenship durational residence and any eligibility condition or other requirement for cash assistance which is prohibited under Title XIX of the Federal Social Security Act; and

(3) The medically needy."

It is noted that this last phrase is not otherwise defined, except by 62 P.S. §442.1:

"A person shall be considered medically needy if he:

(1) Resides in Pennsylvania, regardless of the duration of his residence or his absence therefrom; and

(2) Meets the standards of financial eligibility established by the department with the approval of the Governor. In establishing these standards the department shall take into account (i) the funds certi-

fied by the Budget Secretary as available for medical assistance for the medically needy; (ii) pertinent Federal legislation and regulations; and (iii) the cost of living."

At the hearing before this Court, the parties stipulated that the allegations of fact contained in the Affidavits of R. Stanton Wettick, Jr., Douglass S. Thompson, C. Robert Youngquist, Henry J. Smith, and each of the named Plaintiffs would be accepted as true. From these, it is readily determined that the Plaintiffs had all been certified by the Department as eligible for participation in the PMAP; their pregnancies ranged from six to seventeen weeks; each of the named Plaintiffs were without assets to pay for an abortion or for any examination by physicians other than those at the Hospital or as would be provided by the Hospital; and, none of them were able to meet *all* of the requirements of the Department but, nevertheless, desired abortions. Prior to the issuance of the Injunction, each of the Plaintiffs unsuccessfully attempted to obtain an abortion from the Hospital (Magee-Womens Hospital), and the Hospital advised them that it could not provide the abortions unless, the abortions were either paid for in advance or the particular individuals submitted the documented matters required for reimbursement by the PMAP. The Hospital further advised each of the Plaintiffs that it had no procedures whereby doctors could be provided without charge to the Plaintiffs for the examination required by the PMAP. The Hospital then refused to provide abortions to each of the named Plaintiffs. It was further certified that the Hospital would have provided the abortions if the costs had been reimbursable under the PMAP.

Magee-Womens Hospital is a non-profit institution located in the City of Pittsburgh and is an approved provider of health services under the PMAP. The prior practice of the physicians associated with the Hospital was to schedule abortions within the first eleven weeks of pregnancy because the medical procedures used for abortion during that time period involved significantly lower risks of morbidity and mortality than such procedures at any later stage of pregnancy. The Hospital did not provide abortions to women more than twenty weeks pregnant without special permission and only in extremely unusual cases. Family Planning Services were provided to Medical Assistance recipients, and pharmacists filled prescriptions written by physicians at the Hospital for contraceptives. The costs for these services were reimbursed by the Department, regardless of whether the recipient was married or unmarried.

Following the United States Supreme Court decisions in *Roe v. Wade*, *supra*, and *Doe v. Bolton*, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973) *rehearing denied* 410 U.S. 959, 93 S.Ct. 1410, 35 L.Ed.2d 694, the Hospital began providing abortions to all Medical Assistance recipients without requiring the documented evidence from a performing physician and two other physicians, and had been submitting claims for reimbursement to the Department (about sixty per month). The Department rejected each of the claims for reimbursement because of the Hospital's failure to comply with the Department's Procedures. Effective October 1, 1973, the Hospital provided abortions only if the patient could pay for the abortion or could furnish the documented medical evidence required by the Department.

The Affidavit of each of the Plaintiffs substantially set forth in similar language that each of the "Does" was

unmarried and pregnant and had made the decision not to carry the pregnancy through to birth. Ann Doe elected to have an abortion because of "medical problems I presently have and also because I do not want any more children." She indicated she was refused abortion because she did not have the money or the necessary documentation. Betty Doe elected abortion "because a birth at my age would be a severe burden on my life as well as my family." Cathy Doe's decision was because "I already have four children and another child would further burden our financial plight and cause severe stress on me." Donna Doe's decision was "because I am still in high school and do not wish to have a baby at this time." Elaine Doe's decision was "because my two children and myself are already in financial difficulty and a birth at this time would be a severe burden on my emotional state." Jane Doe's decision was "because of the burden and interruption to my personal life that the birth would cause." Nancy Doe's decision was "because of the burden and interruption to my personal life that the birth would cause." Patricia, Ruth, Sylvia, and Toni, all had substantially the same reasons as Nancy Doe.

At the hearing, the Three Judge Court requested the Attorney General to secure an affidavit relating to the intention of the Department with respect to any change that might be contemplated regarding its requirements for reimbursement for abortions. Subsequently, an Affidavit was filed by an Assistant Attorney General, to the effect that there was no intention on the part of the Department to change its current policies.

The Three Judge Court also requested the Assistant Attorney General to procure from the United States Department of Health, Education and Welfare, a statement

of their position on reimbursement for abortions. He subsequently filed a copy of a Memorandum of the United States as Amicus Curiae in the cases of *New York State Department of Social Services, et al. v. Elizabeth Linda Klein, et al.*, No. 72-770, and *Nassau County Medical Center, et al. v. Elizabeth Linda Klein, et al.*, No. 72-803, October Term 1972, dated May 1973, which took the position, in substance, that the Social Security Act *did not require*, but would not prevent, a Federally funded State Medicaid Program to pay for abortions that were not medically indicated. New York had limited coverage under its Medicaid Program for "the cost of care, services and supplies, which are necessary to prevent, diagnose, correct or cure conditions in the person that cause acute suffering, endanger life, result in illness or infirmity, interfere with his capacity for normal activity, or threaten some significant handicap." The State, in an "administrative letter", interpreted the provision as covering only "necessary and medically indicated care" and, therefore, denied "elective abortions not medically indicated." *City of New York v. Wyman*, 30 N.Y.2d 537, 281 N.E.2d 180 (1972). No violation of the Federal program was found in this situation.

On December 27, 1973, this Court notified the Attorney General that the Amicus Curiae Brief filed in the *Klein* cases did not satisfy the requirements of the Three Judge Court, and requested that an affidavit be supplied with respect to the position of the Department of H.E.W. on the question of reimbursement of the cost of abortions, whether medically indicated or not. On January 12, 1973, the Assistant Attorney General notified the Court by letter that he was unable to secure the cooperation of the United States with respect to obtaining an affidavit of the type

requested by the Court. He stated that the Brief in the *Klein* cases had been submitted in lieu of an affidavit and accurately reflected the position of the United States in the matter. Apparently, however, the Federal Government would share in the costs of abortions under the terms and provisions of the State Medicaid Program.⁵

It must be noted that in dealing with the issues in this case we are precluded from the treatment of abortion on moral grounds, nor are we dealing with abortion in its criminal aspects. We must follow the course which recognizes that the law does not represent itself as a moral code, but rather, as a body of rules wherein the majority of the people impose their will, and, within constitutional limits, invade the freedom of the individual, in the interest of public health and welfare. Whatever may be the private view of the individual or group of individuals, or the mem-

⁵ The Attorney General of Pennsylvania in the letter of August 6, 1973, set forth the following at footnote 4 of the letter:

"⁴ Even before *Wade* and *Bolton*, *supra*, the Federal statute and regulations permitted reimbursement to the states for the cost of abortions. In response to an inquiry as to whether or not the Federal Government reimbursed the states for abortions under the Medical Assistance Program, the Federal Medical Services Administration, which administers the program, replied:

"* * * The following statement may be used to describe M.S.A.'s policy on abortions:

The position taken by M.S.A. on abortions is that the Social Security Act and the HEW regulations provide for Federal matching of state expenditures for all kinds of medical care and services, including patient and hospital services, outpatient hospital services, physician services, drugs, etc. If the State Medicare Program paid for these services whether for abortion or any other medical services, the Federal Government shared the cost with the state.' "

bers of this Court, we are bound by the now established principle of law that a negation of an individual's choice in the matter of abortion during the first trimester of pregnancy is an unwarranted invasion of that person's fundamental rights as established by the Fourteenth Amendment to the Constitution of the United States.

The Supreme Court has said (*Roe v. Wade*, *supra*, 93 S.Ct. 726, 728):

"This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is . . . in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."

* * * * *

"Although the results are divided, most of these courts have agreed that the right of privacy, however based, is broad enough to cover the abortion decision; that the right, nonetheless, is not absolute and is subject to some limitations; and that at some point the state interests as to protection of health, medical standards, and prenatal life, become dominant. We agree with this approach."

Thus, we are here concerned with "fundamental rights" which must be balanced against "compelling state interests" where legislative enactments including State-wide Regulations pursuant thereto must be narrowly drawn to express only state interests. *Kramer v. Union Free School District*, 395 U.S. 621, 627, 89 S.Ct. 1886, 1890, 23 L.Ed.2d 583 (1969); *Shapiro v. Thompson*, 394 U.S.

618, 634, 89 S.Ct. 1322, 1331, 22 L.Ed.2d 600 (1969); *Griswold v. Connecticut*, 381 U.S. 479, 485, 85 S.Ct. 1678, 1682, 14 L.Ed.2d 510 (1965); *Aptheker v. Secretary of State*, 378 U.S. 500, 508, 84 S.Ct. 1659, 1664, 12 L. Ed.2d 992 (1964); *Sherbert v. Verner*, 374 U.S. 398, 406, 83 S.Ct. 1790, 1795, 10 L.Ed.2d 965 (1963); *Cantwell v. Connecticut*, 310 U.S. 296, 307-308, 60 S.Ct. 900, 904-905, 84 L.Ed. 1213 (1940). See *Eisenstadt v. Baird*, 405 U.S. 438, 460, 463-464, 92 S.Ct. 1029, 1042, 1043-1044, 31 L.Ed.2d 349 (1972) (White, J., concurring).

I. STANDING

The Defendants contend that the Plaintiffs have no standing to bring this action seeking reimbursement to the Hospital. Each of the Plaintiffs in this case is a participant in the Medicaid Program established and regulated by Sub-Chapter XIX of the Social Security Act of 1953, as amended, Section 1396 *et seq.* of Title 42 U.S.C. Each of the Plaintiffs desired an abortion and in none of these cases was there an attempt to fully comply with the requirements of the PMAP. This Court finds that the State's Procedures, limiting reimbursement as indicated, operated to prevent the Plaintiffs from obtaining the abortions they sought. It was admitted that the Hospital would have furnished the Plaintiffs with the abortions if these abortions had been reimbursable under the PMAP.

At the threshold of the question of standing is the concept recently set forth by the Supreme Court of the United States in *Goldberg v. Kelly*, 396 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970), (involving the determination that procedural due process under the Fourteenth Amendment required an evidentiary hearing before termi-

nation of welfare benefits under the Aid to Families with Dependent Children Program (AFDC)), (at footnote 8, 25 L.Ed.2d at 295):

"It may be realistic today to regard welfare entitlements as more like 'property' than a 'gratuity.' Much of the existing wealth in this country takes the form of rights that do not fall within traditional common-law concepts of property. It has been aptly noted that '[s]ociety today is built around entitlement. The automobile dealer has his franchise, the doctor and lawyer their professional licenses, the worker his union membership, contract, and pension rights, the executive his contract and stock options; all are devices to aid security and independence. Many of the most important of these entitlements now flow from government: subsidies to farmers and businessmen, routes for airlines and channels for television stations; long term contracts for defense, space, and education; social security pensions for individuals. Such sources of security, whether private or public, are no longer regarded as luxuries or gratuities; to the recipients they are essentials, fully deserved, and in no sense a form of charity. It is only the poor whose entitlements, although recognized by public policy, have not been effectively enforced.' Reich, Individual Rights and Social Welfare; The Emerging Legal Issues, 74 Yale LJ 1245, 1255 (1965). See also Reich, The New Property, 73 Yale LJ 733 (1964)."

The Supreme Court thus held in *Goldberg* (25 L.Ed. 2d at pp. 295-297):

"Appellant does not contend that procedural due process is not applicable to the termination of welfare

benefits. Such benefits are a matter of statutory entitlement for persons qualified to receive them. Their termination involves state action that adjudicates important rights. The constitutional challenge cannot be answered by an argument that public assistance benefits are 'a "privilege" and not a "right."' *Shapiro v Thompson*, 394 US 618, 627 n 6, 22 L Ed 2d 600, 611, 89 S Ct 1322 (1969). Relevant constitutional restraints apply as much to the withdrawal of public assistance benefits as to disqualification for unemployment compensation, *Sherbert v Verner*, 374 US 398, 10 L Ed 2d 965, 83 S Ct 1790 (1963); or to denial of a tax exemption, *Speiser v Randall*, 357 US 513, 2 L Ed 2d 1460, 78 S Ct 1332 (1958); or to discharge from public employment, *Slochower v Board of Higher Education*, 350 US 551, 100 L Ed 692, 76 S Ct 637 (1956). The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss,' *Joint Anti-Fascist Refugee Committee v McGrath*, 341 US 123, 168, 95 L Ed 817, 852, 71 S Ct 624 (1951) (Frankfurter, J., concurring), and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication. Accordingly, as we said in *Cafeteria & Restaurant Workers Union v McElroy*, 367 US 886, 895, 6 L Ed 2d 1230, 1236, 81 S Ct 1743 (1961), 'consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.' See also *Hannah v*

Larche, 363 US 420, 440, 442, 4 L Ed 2d 1307, 1320, 1321, 80 S Ct 1502 (1960).

It is true, of course, that some governmental benefits may be administratively terminated without affording the recipient a pre-termination evidentiary hearing. But we agree with the District Court that when welfare is discontinued, only a pre-termination evidentiary hearing provides the recipient with procedural due process. Cf. *Sniadach v Family Finance Corp.*, 395 US 337, 23 L Ed 2d 349, 89 S Ct 1820 (1969). For qualified recipients, welfare provides the means to obtain essential food, clothing, housing, and medical care. Cf. *Nash v Florida Industrial Commission*, 389 US 235, 239, 19 L Ed 2d 438, 442, 88 S Ct 362 (1967). Thus the crucial factor in this context—a factor not present in the case of the black-listed government contractor, the discharged government employee, the taxpayer denied a tax exemption, or virtually anyone else whose governmental entitlements are ended—is that termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits. Since he lacks independent resources, his situation becomes immediately desperate. His need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from the welfare bureaucracy."

Relevant constitutional restraints therefore apply to public assistance benefits and their recipients, and there is standing in welfare recipients to challenge State-wide Regulations which exclude welfare recipients who would otherwise be covered by Medical Assistance. *Shapiro v. Thompson*, *supra*; *King v. Smith*, *supra*. Cf. *Data Process-*

ing Service v. Camp, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed. 2d 184 (1970) (holding that the question of standing is the question of whether the interest sought to be protected by the complainant is arguably within the zone of interest to be protected or regulated by the statute or constitutional guarantee in question, 25 L.Ed.2d at 188). When a person or a family has a spiritual stake in First Amendment values sufficient to give standing to raise issues concerning the "establishment" clause and the "free exercise" clause, *Abbington School District v. Schempp*, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963); or when standing may reflect "aesthetic, conservational, and recreational, as well as economic values", *Office of Communication of United Church of Christ v. F.C.C.*, 123 U.S. App. D.C. 328, 334-340, 359 F.2d 994, 1000-1006 (1966); then standing certainly arises from the economic injury on which the Petitioners here rely. *U.S. Dept. Agriculture v. Moreno*, *supra*; *Goldberg v. Kelly*, *supra*; *Stewart v. Wohlgenuth*, 355 F.Supp. 1212 (W.D. Pa. 1972). The named Plaintiffs thus have standing to bring the instant action.

II. CLASS ACTION DETERMINATION

A difficult question is involved in the determination of the proper class. The Plaintiffs allege that they were females of child bearing age and all were certified by the Department as eligible under the PMAP. The Plaintiffs then allege that they brought this action on behalf of themselves and all others similarly situated pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure.⁶ The

⁶ Rule 23(b)(2) provides: "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole".

Primary Judge refused to order the case to be maintained as a class action, and deferred the decision of this question to the Three Judge Court.

After due consideration, this Court determines that the action shall not be maintained as a class action because the differing individual circumstances which exist would unnecessarily complicate this action, and thus, a class action under Rule 23 Fed.R.Civ.P. would not be a superior method for adjudication of this controversy. See: *Tindall v. Hardin*, 337 F.Supp. 563 (W.D. Pa. 1972) affirmed *sub nomine Carter v. Butz*, 479 F.2d 1084 (3rd Cir. 1973). See also *Stewart v. Wohlgenuth*, *supra*. This is particularly true in light of the considerations which are involved in the "trimester" holdings of the United States Supreme Court in *Roe v. Wade*, *supra*, and in *Doe v. Bolton*, *supra*; and the reversal of *Klein v. Nassau County Medical Center*, 347 F.Supp. 496 (E.D.N.Y. 1972) (Three Judge Court), at U.S. , 93 S.Ct. 2747, 37 L.Ed.2d 152 (1973), where the judgment was vacated and the case remanded to the United States District Court for further consideration in light of *Roe v. Wade*, *supra*, and *Doe v. Bolton*, *supra*.

In view of the fact that the Court is holding the Regulations and/or Procedures of the PMAP to be unconstitutional, as more particularly hereinafter set forth, we are confident that the Defendants will respect the Order of this Court, and we do not at this time need to become involved in the complexities of a class action. Separate actions can be disposed of as they may arise. See *Bailey v. Patterson*, 369 U.S. 31, 82 S.Ct. 549, 7 L.Ed.2d 512 (1962); *Turner v. Colonial Finance Corp.*, 467 F.2d 202 (1st Cir. 1972). The Court, therefore, directs that the cases not be maintained as a class action.

It is necessary, therefore, with respect to the Plaintiffs here involved, that we decide the two basic attacks made against the Regulations and/or Procedures of the PMAP: (1) that the Pennsylvania Regulations are inconsistent with the Social Security Act, and thereby violate the Supremacy Principle, and (2) that the Pennsylvania Regulations create an unlawful distinction (in violation of the Equal Protection Clause) between indigent women who choose to carry their pregnancies to birth and indigent women who choose to terminate their pregnancies by abortion.

III. THE PENNSYLVANIA MEDICAL ASSISTANCE PROGRAM IS NOT INCONSISTENT WITH THE SOCIAL SECURITY ACT

The Federal Government makes substantial funds available to those States desiring to participate in the program to provide medical care to individuals and families "whose income and resources are insufficient to meet the costs of necessary medical services", Title XIX of the Social Security Act, 42 U.S.C. §1396 *et seq.* Under the Act, participating States are required to provide medical services to individuals and families who are eligible for cash grant assistance under any of the Federal categories of assistance, such as, Aid to the Blind, Aid to the Permanently and Totally Disabled, Old Age Assistance, Aid to Families with Dependent Children, 42 U.S.C. §1396a(a) (13). These individuals and families are considered the "categorically needy". 45 CFR 249.10(a) (1).

A second group of individuals termed "medically needy" may also benefit under this Act, and is composed of those persons whose income is too great to qualify for

cash assistance as "categorically needy", and yet insufficient to meet the costs of medical care. 42 U.S.C. §1396a(a) (10) (B). This group also consists of individuals benefiting from Federal money available to meet the cost of administration of a Medical Assistance Program, or others who do not come under one of the Federal categories. 45 CFR 248.10(d) (1). As stated before, Pennsylvania has elected to extend medical benefits to the "medically needy". 62 P.S. §441.1 *et seq.*

A statutory requirement for participating States is that they must provide certain minimal medical services under the program. For "categorically needy" persons, the State must provide: (1) inpatient hospital services; (2) outpatient hospital services; (3) other laboratory and X-ray services; (4) skilled nursing facility services, screening and diagnosis of children, family planning services and supplies furnished to individuals of child bearing age; and (5) physicians' services furnished by a physician whether in the office, patient's home, hospital or elsewhere. 42 U.S.C. §1396a(a) (13) (B). For "medically needy" persons, the State has the option of providing from among the above five services, and Pennsylvania has elected to provide the five services as minimal services for the "medically needy", with the exception of the "screening and diagnosis of children."

The Plaintiffs contend that the abortion services which Pennsylvania has limited by its Procedures fall squarely within the category of "physicians' services" which are medically necessary and, therefore, within the requirements of the Social Security Act. Their argument is stated as follows (pp. 20 and 21 Plaintiffs' Brief):

"Under the Federal statutory scheme, inpatient hospital services fall into the same category as phy-

sicians' services i.e. they are minimally required for the 'categorically needy' and they are an elective minimal requirement by Pennsylvania as to the 'medically needy.' 42 U.S.C. §1396a(a)(13)(B) and (C). Inpatient hospital services (other than services in an institution for tuberculosis or mental diseases) are defined as follows by H.E.W. regulations:

'Inpatient hospital services' are those items and services *ordinarily furnished by the hospital* for the care and treatment of inpatients provided under the direction of a physician or dentist in an institution maintained primarily for treatment and care of patients with disorders other than tuberculosis or mental diseases and which is licensed. . . . 45 C.F.R. 249.10 (b) (1) (emphasis added)'

While a hospital may be free under *Doe v. Bolton, supra*, to refuse to permit abortive surgery within its confines, nothing legally prevents a hospital from including abortions as an 'ordinarily furnished' service. (Magee-Womens Hospital, for example, has been performing abortions on a regular basis.) And under the above H.E.W. regulations, the State is not free to refuse to reimburse hospitals for services they are providing on a regular basis. Consequently, Pennsylvania's policy of refusing reimbursement for abortion services, at least to the extent such reimbursement is for inpatient hospital services, is a violation of Federal law."

* * * * *

"After the Supreme Court decisions in *Roe v. Wade, supra*, and *Doe v. Bolton, supra*, it is clear that absolutely no State law can constitutionally ex-

clude abortion services from the scope of practice of a physician. Consequently, Pennsylvania's practice of refusing to reimburse for abortion services, at least to the extent such services represent physicians' services, violates the Social Security Act in that it does not provide for the minimum level of coverage required by the Act."

The question remains: Whether the Pennsylvania Procedures governing reimbursement for costs of abortions are compatible with the Federal Statute? We believe this question must be answered in the affirmative.

In order to qualify for Federal funding, state programs must satisfy the requirements of 42 U.S.C. §1396a, including the requirement of §1396a(a)(17) that "a state plan for medical assistance must include reasonable standards * * * for determining eligibility for and the extent of medical assistance under the plan which (A) are consistent with the objectives of this subchapter, * * *". Physicians' services with regard to an abortion may be considered to fall within the purview of necessary medical services under Title XIX, and the Department does not dispute this fact. While nowhere in the Act is there a specific provision authorizing medical assistance payments for abortions, there are a number of sections that, when considered together with corollary regulations, must be interpreted to permit reimbursement for the costs of abortions performed. These include: 42 U.S.C. §1396d(a) 1, and 45 CFR 249.10(b) (1) which pertain to inpatient hospital services; 42 U.S.C. §1396 d(a) (5) and 45 CFR 249.10(b) (5) which apply to physicians' services; 42 U.S.C. §1396d(a) (6) and 45 CFR 249.10(b) (6) which relate to medical care or any other type of remedial care recognized under State law, furnished by licensed prac-

tioners within the scope of their practice as defined by State law; and 42 U.S.C. §1396d(a)(4) and 45 CFR 249.10(a)(10) which would include services in relation to family planning.

But, even if we assume, as do the Plaintiffs, that abortion payments are clearly authorized under Title XIX of the Social Security Act, nevertheless, Congress has given the States great latitude in establishing standards for the administration of the various plans, under the doctrine of a "scheme of cooperative federalism." (Emphasis supplied). *N.Y.S. Dept. of Social Services v. Dublino*, U.S. S. Ct. , 37 L. Ed. 2d 688 (1973). (The Social Security Act does not bar a state from independently requiring individuals to accept employment as a condition for receipt of federally funded aid to families with dependent children); *Jefferson v. Hackney*, 406 U.S. 535, 92 S. Ct. 1724, 32 L. Ed. 2d 285 (1972). (Allowing Texas to grant the full standard of need assistance under Old Age Assistance while granting only 95% of the full standard of need to Aid for Blind and Aid for Permanently and Totally Disabled, and 75% of the full standard of need to Aid to Families with Dependent Children, AFDC); *Ch. Xing v. Smith, supra*. (Invalidating the Alabama "substitute father" regulation which denied AFDC payments to children of a mother who "cohabits" in or outside her home with any single or married man, holding that: 201 F.2d 23 at 1127).

"Alabama's argument based on its interest in discouraging immorality and illegitimacy would have been quite relevant at one time in the history of the AFDC program. However, subsequent developments clearly establish that these state interests are not presently legitimate justifications for AFDC disqual-

fication. Insofar as this or any similar regulation is based on the State's asserted interest in discouraging illicit sexual behavior and illegitimacy, it plainly conflicts with federal law and policy."

Thus, the question becomes: Whether or not Pennsylvania may, by means of its Regulations and/or Procedures, determine when the performance of an abortion becomes a medical necessity?

In *Dandridge v. Williams*, 397 U.S. 471, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (1970), the Supreme Court of the United States upheld a Maryland maximum grant regulation limiting the total amount of aid any one family unit could receive under the State's Aid to Families with Dependent Children Program (AFDC) against attack on the grounds that it is in conflict with the Social Security Act of 1935 and with the Equal Protection Clause of the Fourteenth Amendment. After referring to the legislative history of the program, the Court determined that Maryland was entitled to establish its own standard of need with regard to each eligible family unit without contravening the purposes of the AFDC Program, holding as follows (25 L. Ed. 2d at pp. 496-498):

"In its original opinion the District Court held that the Maryland regulation does conflict with the federal statute, and also concluded that it violates the Fourteenth Amendment's equal protection guarantee. After reconsideration on motion, the court issued a new opinion resting its determination of the regulation's invalidity entirely on the constitutional ground. Both the statutory and constitutional issues have been fully briefed and argued here, and the judg-

ment of the District Court must, of course, be affirmed if the Maryland regulation is in conflict with either the federal statute or the Constitution. We consider the statutory question first, because if the appellees' position on this question is correct, there is no occasion to reach the constitutional issues. *Ashwander v. TVA*, 297 U.S. 288, 346-347, 80 L. Ed. 688, 710, 711, 56 S. Ct. 466 (Brandeis, J., concurring); *Rosenberg v. Fleuti*, 374 U.S. 449, 10 L. Ed. 2d 1000, 83 S. Ct. 1804.

I.

The appellees contend that the maximum grant system is contrary to §402(a)(10) of the Social Security Act, as amended, which requires that a state plan shall 'provide . . . that all individuals wishing to make application for aid to families with dependent children shall have opportunity to do so, and that aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals.' The argument is that the state regulation denies benefits to the younger children in a large family. Thus, the appellees say, the regulation is in patent violation of the Act, since those younger children are just as 'dependent' as their older siblings under the definition of 'dependent child' fixed by federal law. See *King v. Smith*, 392 U.S. 309, 20 L. Ed. 2d 1118, 88 S. Ct. 2128. Moreover, it is argued that the regulation, in limiting the amount of money any single household may receive, contravenes a basic purpose of the federal law by encouraging the parents of large families to 'farm out' their children to relatives whose grants are not yet subject to the maximum limitation.

It cannot be gainsaid that the effect of the Maryland maximum grant provision is to reduce the per capita benefits to the children in the largest families. Although the appellees argue that the younger and more recently arrived children in such families are totally deprived of aid, a more realistic view is that the lot of the entire family is diminished because of the presence of additional children without any increase in payments. Cf. *King v. Smith*, *supra*, at 335 n. 4, 20 L. Ed. 2d at 1135 (Douglas, J., concurring). It is no more accurate to say that the last child's grant is wholly taken away than to say that the grant of the first child is totally rescinded. In fact, it is the *family* grant that is affected. Whether this per capita diminution is compatible with the statute is the question here. For the reasons that follow, we have concluded that the Maryland regulation is permissible under the federal law.

In *King v. Smith*, *supra*, we stressed the States' 'undisputed power,' under these provisions of the Social Security Act, 'to set the level of benefits and the standard of need.' *Id.*, at 334, 20 L. Ed. 2d at 1135. We described the AFDC enterprise as 'a scheme of cooperative federalism,' *id.*, at 316, 20 L. Ed. 2d at 1125, and noted carefully that '[t]here is no question that States have considerable latitude in allocating their AFDC resources, since each State is free to set its own standard of need and to determine the level of benefits by the amount of funds it devotes to the program.' *Id.*, at 318-319, 20 L. Ed. 2d at 1126."

In the case before this Court, as noted previously, Congress was silent with respect to specific authorization

of medical assistance for abortions. Pennsylvania standards must be scrutinized without curtailment by Congressional action and the State Regulations and/or Procedures must be given great latitude in providing for the administration of the Program. We, therefore, feel compelled to find Pennsylvania's Regulations do not conflict with Title XIX of the Social Security Act.

IV. PENNSYLVANIA'S PROCEDURES RESTRICTING MEDICAL REIMBURSEMENT FOR ABORTIONS VIOLATE EQUAL PROTECTION CLAUSE OF FOURTEENTH AMENDMENT

The Plaintiffs further contend that since pregnant women need medical services in connection with their pregnancies, a distinction between indigent pregnant women who choose to carry their pregnancies to birth and indigent pregnant women who choose to terminate their pregnancies by abortion, deprive women who choose abortion of their equal protection rights guaranteed by the Fourteenth Amendment to the United States Constitution.

The Supreme Court in a recent decision of *Cleveland Board of Education, et al. v. Jo Carol LaFleur, et al.*, and *Susan Cohen v. Chesterfield County School Board, et al.*, 42 U.S. Law Week 4186, decided January 21, 1974, in an Opinion by Justice Stewart, speaking for Mr. Justices Brennan, White, Marshall, and Blackmun, and concurred in by Justice Douglas, held unconstitutional certain regulations of Cleveland, Ohio and Chesterfield County, West Virginia, relating to mandatory leave rules applied to pregnant school teachers and stated the following (at p. 4189):

"This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment. *Roe v. Wade*, 410 U.S. 113; *Loving v. Virginia*, 388 U.S. 1, 12; *Griswold v. Connecticut*, 381 U.S. 479; *Pierce v. Society of Sisters*, 268 U.S. 510; *Meyer v. Nebraska*, 262 U.S. 390. See also *Prince v. Massachusetts*, 321 U.S. 158; *Skinner v. Oklahoma*, 316 U.S. 535. As we noted in *Eisenstadt v. Baird*, 405 U.S. 438, 453, there is a right 'to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.'

By acting to penalize the pregnant teacher for deciding to bear a child, overly restrictive maternity leave regulations can constitute a heavy burden on the exercise of these protected freedoms. Because public school maternity leave rules directly affect 'one of the basic civil rights of man,' *Skinner v. Oklahoma, supra*; at 541, the Due Process Clause of the Fourteenth Amendment requires that such rules must not needlessly, arbitrarily, or capriciously impinge upon this vital area of a teacher's constitutional liberty."

Under traditional Equal Protection standards, once the State chooses to pay for medical services rendered in connection with the pregnancies of some indigent women, it cannot refuse to pay for the medical services rendered in connection with the pregnancies of other indigent women electing abortion, unless the disparate treatment supports a legitimate State interest. *U.S. Dept. of Agriculture v. Moreno, supra*; *Weber v. Aetna Casualty & Surety Co.*,

406 U.S. 164, 92 S. Ct. 1400, 31 L. Ed. 2d 768 (1972); *Reed v. Reed*, 404 U.S. 71, 92 S. Ct. 251, 30 L. Ed. 2d 225 (1971); *Eisenstadt v. Baird*, *supra*. The Court in *King v. Smith*, *supra*, well summarized public welfare policy as follows (20 L. Ed. 2d at pp. 1127, 1130):

"A significant characteristic of public welfare programs during the last half of the 19th century in this country was their preference for the 'worthy' poor. Some poor persons were thought worthy of public assistance, and others were thought unworthy because of their supposed incapacity for 'moral regeneration.' H. Leyendecker, *Problems and Policy in Public Assistance* 45-57 (1955); Wedemeyer & Moore, *The American Welfare System*, 54 Calif L. Rev. 326, 327-328 (1966). This worthy-person concept characterized the mothers' pension welfare programs, which were the precursors of AFDC. See W. Bell, *Aid to Dependent Children* 3-19 (1965). Benefits under the mothers' pension programs, accordingly, were customarily restricted to widows who were considered morally fit. See Bell, *supra*, at 7; Leyendecker, *supra*, at 53."

* * * * *

"The most recent congressional amendments to the Social Security Act further corroborate that federal public welfare policy now rests on a basis considerably more sophisticated and enlightened than the 'worthy-person' concept of earlier times. State plans are now required to provide for a rehabilitative program of improving and correcting unsuitable homes, §402(a), as amended by §201(a)(1)(B), 81 Stat 877, 42 U.S.C. §602(a)(14) (1964 ed., supp. III); §406, as amended by §201(f), 81 Stat 880, 42

U.S.C. §606 (1964 ed., Supp. III); to provide voluntary family planning services for the purpose of reducing illegitimate births, §402(a), as amended by §201(a)(1)(C), 81 Stat 878, 42 U.S.C. §602(a)(15) (1964 ed., Supp. III); and to provide a program for establishing the paternity of illegitimate children and securing support for them, §402(a), as amended by §201(a)(1)(C), 81 Stat 878, 42 U.S.C. §602(a)(17) (1964 ed., Supp. III)."

Pennsylvania seeks to sustain its Procedures not on the basis that there is a lack of discrimination, but that there is no "invidious" discrimination and that the Procedures are rationally supportable on valid grounds.

The Department first of all contends that in the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. The Department states in its Brief (at p. 8):

"... A legislature may address a problem one step at a time or even select one phase of one field and apply a remedy there, neglecting others. So long as its judgments are rational, and not invidious, the legislature's efforts to tackle the problems of the poor and the needy are not subject to a constitutional straightjacket. The very complexity of the problems suggests that there will be more than one constitutionally permissible method of solving them." Citing *Dandridge v. Williams*, *supra*; *Jefferson v. Hackney*, *supra*.

An analysis of *Dandridge v. Williams*, *supra*, however, does not give support to the State's contention in this case. In *Dandridge*, a fiscal basis was found by the Court

for the State's interest in encouraging employment and avoiding discrimination between welfare families and the families of the working poor; for by combining the limit on a recipient's grant with permission to retain money earned, without reduction in the amount of the grant, Maryland provided an incentive to seek gainful employment. Certainly, no such fiscal interest can be promoted in the instant case where it is obvious that the cost of an abortion may well be far less than the cost of prenatal care, childbirth, and post partum treatment. Yet the State will pay the latter costs for any Medical Assistance recipient who does not elect abortion.

The Supreme Court in *Hagans v. Lavine, Commissioner of New York State Department of Social Services*, 42 L.W. 4381 at 4385, had this to say about the *Dandridge* case:

"In *Dandridge v. Williams, supra*, AFDC recipients challenged the Maryland maximum grant regulation on equal protection grounds. We held that the issue should be resolved by inquiring whether the classification had a rational basis. Finding that it did, we sustained the regulation. But *Dandridge* evinced no intention to suspend the operation of the Equal Protection Clause in the field of social welfare law. State laws and regulations must still 'be rationally based and free from invidious discrimination.' 397 U.S. at 487. See *Jefferson v. Hackney*, 406 U.S. 535, 546 (1972); *Carter v. Stanton, supra*, 405 U.S. at 671; cf. *San Antonio School District v. Rodriguez*, 411 U.S. 1 (1973)."

Of course, a State cannot justify on the basis of fiscal integrity a regulation which would exclude a woman from Medical Assistance reimbursement because she has decided

to exercise a constitutional right related to the decision as to whether to bear or beget a child. Thus, in *Shapiro v. Thompson, supra*, (which involved a residency requirement), the Court stated as follows (22 L. Ed. 2d at pp. 613, 614):

"Alternatively, appellants argue that even if it is impermissible for a State to attempt to deter the entry of all indigents, the challenged classification may be justified as a permissible state attempt to discourage those indigents who would enter the State solely to obtain larger benefits. We observe first that none of the statutes before us is tailored to serve that objective. Rather, the class of barred newcomers is all-inclusive, lumping the great majority who come to the State for other purposes with those who come for the sole purpose of collecting higher benefits. In actual operation, therefore, the three statutes enact what in effect are nonrebuttable presumptions that every applicant for assistance in his first year of residence came to the jurisdiction solely to obtain higher benefits. Nothing whatever in any of these records supplies any basis in fact for such a presumption.

More fundamentally, a State may no more try to fence out those indigents who seek higher welfare benefits than it may try to fence out indigents generally. Implicit in any such distinction is the notion that indigents who enter a State with the hope of securing higher welfare benefits are somehow less deserving than indigents who do not take this consideration into account. But we do not perceive why a mother who is seeking to make a new life for herself and her children should be regarded as less de-

serving because she considers, among other factors, the level of a State's public assistance. Surely such a mother is no less deserving than a mother who moves into a particular State in order to take advantage of its better educational facilities."

* * * * *

"We recognize that a State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens. It could not, for example, reduce expenditures for education by barring indigent children from its schools. Similarly, in the cases before us, appellants must do more than show that denying welfare benefits to new residents saves money. The saving of welfare costs cannot justify an otherwise invidious classification."

The Assistant Attorney General also contends that since the basic requirements as set forth in the Department's Procedures were those approved by the Joint Commission on Accreditation of Hospitals that, therefore, "An examination of the requirements clearly reveals that although they may not serve with mathematical nicety, there can be no doubt that the instances where the Commonwealth will pay for an abortion are reasonable and logical. These requirements are set forth not by judges or lawyers, but by doctors who are immediately concerned with the problems of abortion." (Defendant's Brief p. 9). The difficulty with this position is that in this case we are not concerned with the views that doctors may have on the question of where, or under what circumstances, they

might best choose to perform abortions. In each of the individual Plaintiff's allegations, as admitted by the Defendants, there were doctors available who did not consider it necessary that there be concurrence by two other physicians before the abortion was performed. These doctors did not consider that the abortion was necessary because of a threat to the health of the patient if the pregnancy was carried to term, or that it was necessary because the infant might be born with an incapacitating physical deformity or mental deficiency, or that it was necessary because the pregnancy resulted from statutory or forcible rape, which may have constituted a threat to the mental or physical health of the patient.

Roe v. Wade, supra, must be considered as dispositive of the contentions in the instant case. The Supreme Court held that the right of privacy was broad enough to include the abortion decision. (410 U.S. 153, 154, 93 S. Ct. 727, 35 L. Ed. 2d 177). Freedom of choice was recognized as a fundamental right during the first three months of pregnancy to be exercised by the pregnant woman in consultation with her physician free from State interference. The Court stated (410 U.S. at 163, 93 S. Ct. at 732, 35 L. Ed. 2d at 183):

"This means, . . . that, for the period of pregnancy prior to this 'compelling' point, *the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that in his medical judgment, the patient's pregnancy should be terminated.* If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State." (Emphasis added)

During this first trimester, State regulations impinging in any manner with a fundamental right must be examined

with close scrutiny by the Courts. Thereafter, however, the State's legitimate interest in potential life becomes *compelling* and the State may reasonably regulate. The Court held (410 U.S. at p. 163, 93 S. Ct. at pp. 731-732, 35 L. Ed. 2d at pp. 182, 183):

"With respect to the State's important and legitimate interest in the health of the mother, the 'compelling' point, in the light of present medical knowledge, is at approximately the end of the first trimester. * * * It follows that, from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health. Examples of permissible state regulation in this area are requirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status; as to the licensing of the facility; and the like."

Therefore, since the PMAP serves to regulate the elective decision of the pregnant woman and her doctor *throughout the three trimesters*, they are too broad and overreach the State's legitimate interest.

In the original Temporary Restraining Order, the relief that was granted was rather broad in nature. This was done in consideration of the fact that most of the Plaintiffs were in their first trimester of pregnancy; the few remaining Plaintiffs were not beyond their seventeenth week of pregnancy. These facts were considered along with the Affidavit of Douglass S. Thompson, an Associate

Professor of Obstetrics and Gynecology at the University of Pittsburgh School of Medicine, the Director of the Division of Community Health at Magee-Womens Hospital and the Medical Director, Ob-Gyn Medical Care Center of Magee-Womens Hospital. In his Affidavit he stated that:

"It is the practice of *all* physicians associated with Magee-Womens Hospital to schedule abortions within the first eleven weeks of pregnancy if possible."

* * * * *

"Magee-Womens Hospital will not provide abortions to women who are more than twenty weeks pregnant without special permission for extremely unusual cases."

As for the accompanying Order, we intend to require payment by the PMAP for only elective abortions where the mother is *in* the first trimester of her pregnancy and *not* beyond the twelfth week of said pregnancy. The plaintiffs in their "Prayer for Relief" sought *inter alia*:

"This Court preliminarily and permanently enjoin defendants from refusing to pay the reasonable costs of abortion services prescribed by a qualified physician and provided to women eligible for Medical Assistance."

After carefully scrutinizing the Regulations of PMAP and after reaching the conclusions that these Regulations do impinge on a fundamental right in the first trimester, the relief sought must be limited to that particular part of the pregnancy.

Pennsylvania has further contended that the PMAP cover only *necessary* medical services because of a need

to conserve hospital space and State funds. We believe, however, that the Supreme Court in *Roe v. Wade, supra*, recognized that abortion is a necessary medical service for it may prevent specific and direct harm which is medically diagnosable (e.g. psychological harm), may protect the woman's future mental and physical health, and may prevent the distress associated with the unwanted pregnancy and child, (410 U.S. at p. 153, 93 S. Ct. at 727, 35 L. Ed. 2d at 177). Furthermore, every pregnant woman requires medical services in connection with her pregnancy. The expense of these services, the need for the use of more extensive hospital facilities, and the risk to the woman's health all increase as the pregnancy advances toward term. The State's classification of what is medically necessary must have some reasonable relation to the rationale behind the classification, and the non-therapeutic abortion, in the light of the *Roe* decision, cannot be validly classified as unnecessary.

As was stated by the District Court in *Klein v. Nassau County Medical Center, supra* (347 F. Supp. at p. 500):

"* * * Pregnancy is a condition which in today's society is universally treated as requiring medical care, prenatal, obstetrical and post-partum care, and undeniably it is provided under the Medicaid program as 'necessary' medical assistance although pregnancy is not an abnormal condition, nor does the medical assistance in childbirth 'cure' it. Medical assistance for abortion is not less 'necessary' because an election to bear the child would obviate that medical assistance and require instead other, more extensive and more expensive medical assistance. The pregnant woman, may not be denied necessary medical assistance because she has made an unwarrantedly dis-

avored choice, and no other basis appears here for denying Medical Assistance. *Eisenstadt v. Baird*, 1972, 405 U.S. 438, 452-453, 92 S. Ct. 1029, 31 L. Ed. 2d 349. State law articulates no policy that authorizes disfavoring one choice, and none other than the invalid argument based on the word 'necessary' is advanced."

It cannot be argued at this time that the justification for denying benefits to indigent women, who wish to terminate their pregnancies by abortion, is to discourage abortion. It is noted that the PMAP, by limiting Medical Assistance reimbursement of abortion costs does not distinguish between married pregnant women and unmarried pregnant women. In *Roe v. Wade, supra*, the Court suggested that discouraging illicit sexual conduct is not a serious argument for justifying restrictions on abortions; nor would there be any such nexus here. In *Doe v. Rampton*, 366 F. Supp. 189 (D.C. Utah 1973), a District Court held unconstitutional a Utah limitation on medical assistance coverage to therapeutic abortions ruling that the Plaintiff "would be denied equal protection of the law if the defendant, his agents and employees are permitted to discriminate between 'therapeutic' and 'non-therapeutic' abortions in the administration of the Medicaid Program." See also *Comment, Abortion on Demand in Post-Wade Context: Must the State Pay the Bills?* 41 Fordham Law Review 921 (1973). We hold that the State's decision to limit coverage to "medically indicated" abortions, as arbitrarily determined by it, is a limitation which promotes no valid State interest. In the PMAP, the State has instituted a program to provide benefits to the poor; the State has excluded certain of the poor from the program; the exclusion denies Medical Assistance benefits to other-

wise eligible applicants solely because they have elected to have an abortion, and the State has been unable to show that the exclusion of such persons promotes a compelling State interest. *Shapiro v. Thompson, supra*.

In *Hathaway v. Worcester City Hospital*, 475 F. 2d 701 (1st Cir. 1973), the Court stated as follows (at pp. 705, 706):

"But it seems clear, after *Roe* and *Doe*, that a fundamental interest is involved, requiring a compelling rationale to justify permitting some hospital surgical procedures and banning [the hospital here had a policy of barring use of facilities for sterilization operations] another involving no greater risk or demand on staff and facilities. While *Roe* and *Doe* dealt with a woman's decision whether or not to terminate a particular pregnancy, a decision to terminate the possibility of any future pregnancy would seem to embrace all of the factors deemed important by the Court in *Roe* in finding a fundamental interest. 410 U.S. at 155, 93 S. Ct. 705, but in magnified form, particularly so in this case given the demonstrated danger to appellant's life and the eight existing children."

* * * * *

"We are merely saying, consistent with the Supreme Court's reasoning in *Shapiro* with regard to welfare payments, that once the state has undertaken to provide general short-term hospital care, as here, it may not constitutionally draw the line at medically indistinguishable surgical procedures that impinge on fundamental rights."

For the aforementioned reasons, we conclude that the Regulations and/or Procedures of the Pennsylvania Medical Assistance Program are unconstitutional because they are in violation of the Equal Protection Clause since they create an unlawful distinction between indigent women who choose to carry their pregnancies to birth, and indigent women who choose to terminate their pregnancies by abortion.

We further conclude that the State may not, by means of any statutes, regulations or procedures similar to those comprising the Pennsylvania Medical Assistance Program, unlawfully impinge upon the fundamental rights of any pregnant woman during the first three months or trimester of her pregnancy.

We do not here decide, as the Dissent would indicate, that the Commonwealth of Pennsylvania is constitutionally unable to limit its expenditures for medical services to those which are medically necessary simply because we hold that payments must be made for "elective" abortions. Rather we hold that the Commonwealth has already determined that the condition of pregnancy brings about the necessity of medical services. The Commonwealth cannot then discriminate with respect to the methods of treatment for that condition, for in the first trimester of pregnancy, *Roe v. Wade, supra*, the selection of the method of treatment is the inviolable fundamental right of the physician and the patient.

It could not be controverted that if the Commonwealth adopted a regulation denying payment for medical services for the birth of an illegitimate child and, at the same time, provided payment for medical services for an abortion to prevent such a birth—such a regulation, which

is but the other side of the same coin, would clearly be an unconstitutional discrimination. It is, therefore, the meaning of this Opinion that the Commonwealth has invidiously discriminated among persons equally eligible for assistance against those who seek medical treatment within the confines of a fundamental right.

As agreed by the Dissent, we are not to determine the presence or absence of a compelling State interest in the first trimester of pregnancy—the Supreme Court of the United States has eliminated this problem in declaring the fundamental right of the physician and patient as being paramount to the interest of the State. We do not hold that the State must finance a fundamental right, but we do hold that the expression of that fundamental right cannot be the basis for invidious discrimination.

An appropriate order will be entered.

ORDER

AND NOW, to-wit, this 3rd day of May, 1974, this Court declines to certify the Plaintiffs as representatives of a class for the reasons stated in the accompanying Opinion, and

Inasmuch as the requests of the original Temporary Restraining Order have been fulfilled, it is not necessary to take any further action with respect thereto; and any further action by this Court will be held in abeyance pending specific requests pursuant to this Opinion.

DANIEL J. SNYDER, JR.

United States District Judge

HERBERT P. SORG

United States District Judge

CC:

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IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 73-846

Ann Doe; Betty Doe, etc., et al., each individually and on
behalf of all other women similarly situated,

Plaintiffs

v.

Helen Wohlgemuth, individually and as Secretary of the
Department of Public Welfare, Commonwealth of Penn-
sylvania, et al.,

Defendants

WEIS, Circuit Judge, dissenting:

As I view it, the effect of the majority opinion is that the Commonwealth of Pennsylvania is constitutionally unable to limit its expenditures for medical services to those which are medically necessary. I do not agree and respectfully dissent.¹

Preliminarily, it must be understood that we are not to determine if the qualified right to obtain an abortion is a fundamental constitutional right. That question has

¹ I agree that under *Super Tire Engineering Co. v. McCorkle*, U.S. , 42 U.S.L.W. 4507 (April 16, 1974), the plaintiffs have standing. I also concur in the court's finding that the State regulations are not in conflict with the federal statute.

been foreclosed by the United States Supreme Court decision in *Roe v. Wade*, 410 U.S. 113 (1973). Its invocation here obscures the basic issue—is the State required to pay for an elective, nonmedically necessary abortion when it does not fund other medically non-necessary services.

Insofar as the factual background is concerned, it was made clear at oral argument that the basic issue in this case centers around “elective” abortions, that is, those situations where there is no evidence of harm to the life or to the physical or emotional health of the mother. If those factors were involved, then Pennsylvania would pay for the necessary services and that matter is not at issue here.² Therefore, the point that I address is the situation where there is no threat to the life or health of the mother and the election of an abortion is purely because of personal preference.³ Thus, the question here is not whether the State may prohibit certain categories of abortions by statute or practice. It does not do so. The issue is whether the Constitution has thrust upon Pennsylvania an affirmative burden to pay for an elective abortion because the legislature has decided that the State will pay for those abortions for the indigent arising from medical necessity. My conclusion is in the negative because there is no constitutional requirement that the State must finance the exercise of a “fundamental” right, nor does a classification which distinguishes between medically necessary and

² The Commonwealth asserts that it does pay the fees of physicians to perform the preliminary examination and the contentions of the plaintiffs to the contrary appear to be in error.

³ There is no question that the issue does not arise as to the second or third trimester because of the *Roe v. Wade*, *supra*, decision limiting its thrust to the first trimester.

non-necessary abortions offend the Equal Protection Clause.

That the State has an affirmative duty to pay for the implementation of fundamental rights is, with certain narrowly carved exceptions, contrary to the weight of constitutional authority. The unusual situation may be typified by *Griffin v. Illinois*, 351 U.S. 12 (1956), requiring that an indigent criminal defendant be furnished with transcripts at State expense. In an analogous situation, *Boddie v. Connecticut*, 401 U.S. 371 (1971), held that an indigent could not be barred from securing a divorce because of inability to pay State assessed filing fees. To be precise, the State was not required to pay the fees but to forego collecting them.⁴ The common element to these cases in this carefully limited category is a State "monopoly" on the effective forum, *i.e.*, the courts. It is crucial here that the State has no monopoly on performing abortions and in fact is not in the business to any degree. It is only the money from the State which is at issue and the absence of State funds, on this record, will not absolutely prevent the plaintiffs from obtaining the services which they desire.⁵ It is important, also, in keeping

⁴ The later cases of *U.S. v. Kras*, 409 U.S. 434 (1973), and *Ortwein v. Schwab*, 410 U.S. 656 (1973), indicate that this principle would not be extended to cover such matters as bankruptcy and state appellate court filing fees in civil cases. Note the distinction between requiring the state to pay out money, as in the transcript cases, as compared to the situation where the state has imposed a monetary obstacle, *e.g.*, filing fee. Similarly, one must recognize that there may be a difference between cases arising under the due process clause and those based on equal protection.

⁵ It may be assumed that various non-profit organizations interested in advancing their point of view of the desirability of abortions on demand realistically could be expected to give finan-

this case in perspective to realize that there is nothing other than its own desire to be recompensed which prevented the Magee-Womens Hospital from performing these procedures. The State created no obstacle, the hospital did. State money may make it easier and more convenient to obtain an abortion but that is not a legitimate basis for creating a constitutional mandate.

With the exception of the narrow area referred to, it is clear that there is no constitutional requirement that a State must fund fundamental rights. A scrutiny of representative Supreme Court determinations on the "fundamental" right classification, including those in the right of privacy category, demonstrates no corollary of required State subsidy.

While *Shapiro v. Thompson*, 394 U.S. 618 (1969),⁶ found the right to travel among the states to be fundamental, no suggestion has been made that transportation charges for the indigent must be paid by the State.

cial assistance if approached. While it has been urged that the existence of private charitable funds should not enter into consideration of cases involving welfare rights, for example, it is an element which points out that payment of monies, not the exercise of fundamental rights, is the point of issue here.

⁶ Shapiro found a residency requirement invalid when it prevented a welfare recipient from receiving payments needed for "the very means to subsist—food, shelter, and other necessities of life," 394 U.S. at 627. *Memorial Hospital v. Maricopa County*, U.S. , 42 U.S.L.W. 4277 (February 26, 1974), similarly struck down residency requirements when used to deny medical care which was *necessary* for the preservation of health. But in *Vlandis v. Kline*, 412 U.S. 441 (1973), a residency requirement affecting the amount of tuition to be paid at a State university was not found to be a *per se* restriction on the right to travel.

While a person may have a fundamental right of privacy to have obscene material in his home, *Stanley v. Georgia*, 394 U.S. 557 (1969), there have been no serious contentions that the State must furnish such material for the indigent. The fundamental rights of freedom of speech and of the press impose no duty on the State to purchase public address systems or printing presses for those unable to pay for them.

I have elaborated perhaps more than necessary the point that although a right may be classified as "fundamental," there is no inherent requirement that there be financial implementation by the State. The principle is important here because it is only when a fundamental right is sought to be regulated or restricted that the State must show a compelling interest to justify its action. In applying such a standard to a purely funding situation, I believe the majority errs.⁷

Absent a fundamental constitutional right basis, the plaintiffs' claim of denial of equal protection must necessarily be analyzed within the less restrictive requirement of a rational relationship to a legitimate governmental in-

⁷ See page 33. Similarly, *Hathaway v. Worcester City Hospital*, 475 F. 2d 701 (1st Cir. 1973), is distinguishable because funding was not the issue. *Roe v. Rampton*, 366 F. Supp. 189 (D. Utah 1973), did not meet the issue involved here. In that case the State refused to pay for all abortions.

Cleveland Board of Education v. LaFleur, U.S. , 42 U.S. L.W. 4186 (January 21, 1974), was decided on the basis of due process and the use of irrebuttable presumptions to penalize a fundamental right. There the plaintiffs were deprived of wages and employment opportunities because of their decision to bear a child. Here, the plaintiffs are not being deprived of welfare rights or of income because of their decision to have an abortion.

terest. *Jefferson v. Hackney*, 406 U.S. 535 (1971), *Richardson v. Belcher*, 404 U.S. 78 (1971), *Dandridge v. Williams*, 397 U.S. 471 (1970).

Simply stated, it is Pennsylvania's position that it will fund only medically necessary procedures for the poor. The State has not chosen to provide a plan of total, comprehensive, all encompassing medical care for those who meet the indigency requirements.⁸ It does not aim to provide such services as may be "elective" or merely desired. While a financial basis for such a broad policy is obvious, another consideration may be the additional strain on limited medical facilities and resources. Nor can we ignore the difficult legislative judgment as to where to draw the line so that the medical services furnished without charge to the indigent are not so grossly disproportionate to those which may be available to those who, while not indigent, have little money to pay for necessary care, let alone electives, after paying for the absolute necessities of life.⁹

⁸ "The Department of Public Welfare pays for those types of medical and allied services given in the home, office, clinic, or hospital, that are recognized as necessary treatment of illness."

"There is no intention to pay for extravagant or superfluous medical care, or care that would be beyond the means of the average family of moderate income." Section 9100(E)(1) Department of Public Welfare Pennsylvania Manual.

⁹ In this context, we find the comment of Justice Powell, although dealing with education, most apt:

"The ultimate wisdom as to these and related problems is not likely to be devined for all time even by the scholars who now so earnestly debate the issues. In such circumstances the judiciary is well advised to refrain from interposing, on the States inflexible constitutional restraints that could circumscribe or handicap the

Having once established a valid basis for its general policy, *e.g.*, payment for only necessary medical expenses, the State does not violate the Equal Protection Clause if the classification is imperfect, lacks mathematical exactness, or in practice may result in some inequities. *Jefferson v. Hackney, supra, Dandridge v. Williams, supra.*

While the plaintiffs contend that elective abortions are ultimately less costly than prenatal, delivery, and postnatal services, I do not find this monetary argument convincing. It may be argued just as forcefully that from the financial standpoint allowing the child to be born will produce a tax paying citizen whose contribution to the State in his lifetime will exceed many times his cost of delivery.

A conspicuous example of the limited scope of the State's funding of medical services for the indigent is the refusal to pay for elective cosmetic surgery.¹⁰ No one contends that this practice offends the Equal Protection Clause even though such services have been paid by the State in some instances when found to be medically necessary.

Surely, no one can argue seriously that in view of the holding that the right to have an abortion has been found to be a fundamental one, the right to receive plastic surgery is not equally so. There can be no doubt that an attempt by a State to impose criminal sanctions upon those seeking or administering such procedures would be struck

continued research and experimentation so vital to finding even partial solutions . . . and to keeping abreast of ever changing conditions." *San Antonio School District v. Rodriguez*, 411 U.S. 1, 43 (1973).

¹⁰ Section 9411.213, D.P.W.—Pa. Manual.

down as unconstitutional. And yet that consideration does not transform what is an elective into a medically necessary operation. The majority's reasoning that dictum in *Roe v. Wade, supra*, makes all abortions, elective or not, into medically necessary ones is logically and factually erroneous.

In the usual equal protection case the State is presumed to have acted within its constitutional powers, even though in practice some inequality may have resulted. *Lindsey v. Normet*, 405 U.S. 56 (1971). A statutory discrimination may not be invalidated if any set of facts may reasonably be conceived to justify it. *McGowan v. Maryland*, 360 U.S. 420 (1960). It is not every classification but only an invidious one that runs afoul of the Equal Protection Clause. *Jefferson v. Hackney, supra.*

A classification based on whether a procedure is medically necessary or unnecessary is not invidious. I dissent.

JOSEPH R. WEIS, J
Circuit Judge

Dated: May 3, 1974

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF PENNSYLVANIA

—
Civil Action No. 73-846
—

Ann Doe; Betty Doe, a minor, by her mother as representative, Mother B. Doe; Cathy Doe; Donna Doe, a minor by her mother as representative, Mother D. Doe; Elaine Doe; Jane Doe, a minor, by her father as representative Father J. Doe; Nancy Doe; Patricia Doe; Ruth Doe; Sylvia Doe; and Toni Doe, each individually and on behalf of all other women similarly situated,

Plaintiffs,

vs.

Helene Wohlgemuth, individually and as Secretary of the Department of Public Welfare, Commonwealth of Pennsylvania; Roger Cutt, individually and as Assistant Deputy Secretary for Medical Services, Commonwealth of Pennsylvania; Glenn Johnson, individually and as Chief of the Bureau of Medicial Assistance, Commonwealth of Pennsylvania; Edward Kalberer, individually and as Executive Director of the Allegheny County Board of Assistance; and the Department of Public Welfare, of the Commonwealth of Pennsylvania,

Defendants.

SUPPLEMENTAL ORDER

—
AND NOW, to-wit, this 28th day of May, 1974, the Plaintiffs having submitted specific Requests for Judgment, and upon due consideration thereof, IT IS HEREBY ADJUDGED AND DECREED that the Regulations and Procedures of the Department of Public Welfare of the Commonwealth of Pennsylvania, as they apply to reimbursement for abortions performed within the first twelve (12) weeks of pregnancy, are unconstitutional. In all other respects, Plaintiffs' Requests for Declaratory Judgment are denied.

IT IS FURTHER ADJUDGED AND DECREED that the Plaintiffs' Requests for Injunctive Relief are denied.

DANIEL J. SNYDER, JR

United States District Judge

HERBERT P. SORG

United States District Judge

CC:

R. Stanton Wettick, Jr., Esquire, 310 Plaza Building,
Pittsburgh, Pa. 15219

Louis Kwall, Esquire, Office of the Attorney General,
1402 State Office Building, Pittsburgh, Pa. 15222.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 74-1726 and 74-1727

Ann Doe; Betty Doe, a minor, by her mother as representative, Mother B. Doe; [Cathy Doe; Donna Doe,] a minor, by her mother as representative, Mother D. Doe; Elaine Doe, Jane Doe, a minor by her father as representative Father J. Doe; Nancy Doe; Patricia Doe; Ruth Doe; Sylvia Doe; and Toni Doe, each individually and on behalf of all other women similarly situated,

Appellees and Cross-Appellants,

v.

Helene Wohlgemuth, individually and as Secretary of the Department of Public Welfare, Commonwealth of Pennsylvania; Roger Cutt, individually and as Assistant Deputy Secretary for Medical Services, Commonwealth of Pennsylvania; Glenn Johnson, individually and as Chief of the Bureau of Medical Assistance, Commonwealth of Pennsylvania; Edward Kalberer, individually and as Executive Director of the Allegheny County Board of Assistance; and the Department of Public Welfare, of the Commonwealth of Pennsylvania,

Appellants and Cross-Appellees.

D. C. Civil No. 73-846

Appeal From the United States District Court for the
Western District of Pennsylvania

Argued October 24, 1974

Before Kalodner, Van Dusen and Gibbons,
Circuit Judges

Norman J. Watkins, Deputy Attorney General
Robert F. Nagel, Deputy Attorney General
Israel Packel, Attorney General
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Attorneys for Appellees & Cross-Appellants

OPINION OF THE COURT
(Filed Dec 10, 1974)

KALODNER, *Circuit Judge.*

These cross-appeals are from the "Supplemental Order" of the three-judge District Court¹ which adjudged unconstitutional Regulations and/or Procedures ("Pro-

¹ Weis, Circuit Judge, and Sorg and Snyder, District Judges.

cedures") of the Pennsylvania Medical Assistance Program ("PMAP") insofar as they pertain to reimbursement to welfare recipients for abortions performed within the first trimester of pregnancy, but denied declaratory relief as to abortions performed during the second trimester of pregnancy, and an application for injunctive relief.

The "Supplemental Order" was entered pursuant to the District Court's opinion² which held that the Procedures violate the equal protection clause of the Fourteenth Amendment in that their limitation of coverage to "medically indicated" abortions "is a limitation which promotes no valid State interest."³ The opinion further held that the Procedures did not conflict with the requirements of Title XIX of the Social Security Act, 42 U.S.C.A. §1396 et seq.

The defendant-representatives of the Commonwealth of Pennsylvania have appealed the District Court's "Supplemental Order" and the plaintiff-welfare recipients have appealed from the denial of declaratory relief as to abortions performed during the second trimester of pregnancy.

The District Court's dispositions were made in an action filed by the plaintiffs-welfare recipients and participants in the PMAP challenging the Procedures which provide that abortions may be performed under the PMAP only in the following situations:

"1. There is documented medical evidence that continuance of the pregnancy may threaten the health or life of the mother;

² The District Court's opinion, Judge Weis, dissenting, is reported at 376 F. Supp. 173 (W.D. Pa. 1974).

³ 376 F. Supp. at 191.

"2. There is documented medical evidence that the infant may be born with incapacitating physical deformity or mental deficiency; or

"3. There is documented medical evidence that a continuance of a pregnancy resulting from legally established statutory or forcible rape or incest, may constitute a threat to the mental or physical health of a patient;

"4. Two other physicians chosen because of their recognized professional competency have examined the patient and have concurred in writing; and

"5. The procedure is performed in a hospital accredited by the Joint Commission on Accreditation of hospitals." 376 F. Supp. at 175.

The "Supplemental Order" of the District Court was entered May 28, 1974, and these cross-appeals were argued to this Court on October 28, 1974.

It now appears that on September 18, 1974, the Attorney General of Pennsylvania filed a Stipulation in a pending independent action which declares that the Procedures here involved "have not been applied . . . when litigation is threatened," since July 8, 1974.

The Stipulation was filed in *Doe v. Wohlgemuth*, Civil Action No. 73-1564, United States District Court for the Eastern District of Pennsylvania,⁴ where welfare recipients have presented challenges raised in the instant case with respect to the Procedures and applied for declaratory and injunctive relief.

⁴ The action was instituted July 12, 1974, and a three-judge court was convened on September 18, 1974 pursuant to the provisions of 28 U.S.C.A. §§2281 and 2284.

The Stipulation provides in relevant part as follows:

"In response to this Court's Order of July 19, 1974, the parties to this action hereby stipulate as follows:

"(1) The policy and practice challenged in this action is presently being applied on a uniform state-wide basis *except* as appears in paragraph (2) below.

"(2) a) *From on or about July 8, 1974, Defendants' Medicaid abortion policies have not been applied in any county in Pennsylvania when litigation is threatened by any eligible person seeking an abortion* and it appears to Defendants' counsel that a failure to reimburse for that abortion would result in repetitious litigation that would end in a court order granting preliminary relief against the Commonwealth. . . ." (emphasis supplied).

The inescapable import of the Stipulation of which we take judicial notice,⁵ is that the Procedures are enforced *only* against welfare recipients who do not threaten suit.

⁵ It is settled that this court may take judicial notice of developments since the taking of an appeal when they are relevant, and that we may further take judicial notice of pleadings in another case, especially where it presents a related issue. *Landy v. Federal Deposit Insurance Corporation*, 486 F.2d 139 (3d Cir. 1973), *cert. denied*, 416 U.S. 960 (1974); *Bryant v. Carleson*, 444 F.2d 353 (9th Cir. 1970), *cert. denied*, 404 U.S. 967; *Kalimian v. Liberty Mutual Life Insurance Company*, 300 F.2d 547 (2d Cir. 1962); *Funk v. Commissioner of Internal Revenue Service*, 163 F.2d 796 (3d Cir. 1947); *Zahn v. Transamerica Corporation*, 162 F.2d 36 (3d Cir. 1947).

The Pennsylvania Department of Welfare and its Secretary, defendants here, are also defendants in *Doe v. Wohlgenuth*, Civil Action No. 73-1564 (E.D. Pa.).

The sum total of the existing situation with respect to the Procedures is that they are enforced as to some welfare recipients and denied as to others.

Standing alone, and independently so, the stated circumstances constitute violation of the equal protection clause of the Fourteenth Amendment. That being so, we do not reach the holding of the court below that the Procedures *per se* violate the Fourteenth Amendment. Assuming *arguendo*, that the Procedures are constitutional and consistent with the Social Security Act, it is long settled that State administrative procedures which are *per se* valid and constitutional may nevertheless be enjoined when they are unconstitutionally applied. *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S. Ct. 1064, 30 L. Ed. 220 (1886).⁶

For the reasons stated, the "Supplemental Order" of the District Court will be vacated and the cause remanded to the District Court with directions to enter an order enjoining enforcement of the Pennsylvania abortion Procedures in accordance with this opinion.

To the Clerk of the Court:

Please file the foregoing opinion.

United States Circuit Judge

VAN DUSEN, *Circuit Judge*, concurring:

While I join in the judgment of the court and in Judge Kalodner's opinion, I also agree with the district court

⁶The Supreme Court has stressed that "a law nondiscriminatory on its face may be grossly discriminatory in its operation." *Williams v. United States*, 399 U.S. 235, 242 (1970); *Griffin v. Illinois*, 351 U.S. 12 at page 17, n.11 (1956).

majority opinion that the Procedures violate the Constitution for the reasons stated in that opinion. See *Doe v. Wohlgemuth*, 376 F. Supp. 173, 190-92 (W. D. Pa. 1974).

UNITED STATES COURT OF APPEALS
For the Third Circuit

Nos. 74-1726/74-1727

Ann Doe; Betty Doe, a minor, by her mother as representative, Mother B. Doe; [Cathy Doe; Donna Doe,] a minor, by her mother as representative, Mother D. Doe; Elaine Doe; Jane Doe, a minor by her father as representative Father J. Doe; Nancy Doe; Patricia Doe; Ruth Doe; Sylvia Doe; and Toni Doe, each individually and on behalf of all other women similarly situated,

Appellants in No. 74-1727

vs.

Helene Wohlgemuth, individually and as Secretary of the Department of Public Welfare, Commonwealth of Pennsylvania; Roger Cutt, individually and as Assistant Deputy Secretary for Medical Services, Commonwealth of Pennsylvania; Glenn Johnson, individually and as Chief of the Bureau of Medical Assistance, Commonwealth of Pennsylvania; Edward Kalberer, individually and as Executive Director of the Allegheny County Board of Assistance; and the Department of Public Welfare of the Commonwealth of Pennsylvania,

Appellants in No. 74-1726

(D.C. Civil Action No. 73-846)

On Appeal From the United States District Court
for the Western District of Pennsylvania

Present: Kalodner, Van Dusen and Gibbons, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed May 28, 1974, be, and the same is hereby vacated, and the cause is remanded to the District Court with directions to enter an order enjoining enforcement of the Pennsylvania abortion Procedures in accordance with the opinion of this Court.

Attest:

THOMAS P. QUINN
Clerk

December 10, 1974

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 74-1726 and 74-1727

Ann Doe; Betty Doe, a minor, by her mother as representative, Mother B. Doe; [Cathy Doe; Donna Doe,] a minor, by her mother as representative, Mother D. Doe; Elaine Doe; Jane Doe, a minor by her father as representative Father J. Doe; Nancy Doe; Patricia Doe; Ruth Doe; Sylvia Doe; and Toni Doe, each individually and on behalf of all other women similarly situated,

Appellants in No. 74-1727

vs.

Frank S. Beal, individually and as Secretary of the Department of Public Welfare, Commonwealth of Pennsylvania; Roger Cutt, individually and as Assistant Deputy Secretary for Medical Services, Commonwealth of Pennsylvania; Glenn Johnson, individually and as Chief of the Bureau of Medical Assistance, Commonwealth of Pennsylvania; James A. Dorsey, Jr., individually and as Executive Director of the Allegheny County Board of Assistance; and the Department of Public Welfare of the Commonwealth of Pennsylvania

Appellants in No. 74-1726

(D. C. Civil No. 73-846)

Appeal From the United States District Court for the
Western District of Pennsylvania

Argued October 24, 1974

Before Kalodner, Van Dusen and Gibbons, *Circuit Judges*
Reargued en banc May 8, 1975

Before Seitz, *Chief Judge*, and Kalodner, Van Dusen,
Aldisert, Adams, Gibbons, Rosenn, Hunter and Garth,
Circuit Judges.

Norman J. Watkins, Deputy Attorney General;
Robert F. Nagel, Deputy Attorney General;
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*Attorneys for Contributors to Pennsylvania Hos-
pital, Amicus Curiae*

OPINION OF THE COURT
(Filed Jul 21, 1975)VAN DUSEN, *Circuit Judge*.

Before us are appeals both by plaintiffs and by the defendants from an order of a three-judge district court entered May 28, 1974, pursuant to an opinion which was filed by the district court on May 3, 1974. *Doe v. Wohlgemuth*, 376 F. Supp. 173 (W. D. Pa. 1974).¹ The case was argued before a panel of this court on October 24, 1974. The panel's opinion and judgment were filed on December 10, 1974. On December 24, 1974, the plaintiffs (appellees and cross-appellants) petitioned the court to rehear the case en banc. On January 31, 1975, we vacated the panel's December 10, 1974, judgment and ordered the case to be reheard en banc. The case was reargued en banc on May 8, 1975.

I. BACKGROUND

The facts appear in the district court's opinion. *Doe v. Wohlgemuth*, *supra* at 175-78. Briefly stated, the plaintiffs are women who are eligible for benefits under the Pennsylvania Medical Assistance Program (PMAP).²

¹ The plaintiffs sought both injunctive and declaratory relief. The district court granted a declaratory judgment for plaintiffs, but denied injunctive relief. Since the plaintiffs have not appealed the district court's denial of injunctive relief, this court has appellate jurisdiction. *Mitchell v. Donovan*, 398 U. S. 427 (1970); 28 U. S. C. §§1253, 1291. The caption was changed to *Doe v. Beal*, pursuant to F. R. Civ. P. 25(a)(1), after the appeal had been docketed in this court.

² See note 16 below for further description of the named plaintiffs. The district court declined to certify the plaintiffs as

The defendants are "the Pennsylvania Department of Public Welfare (Department) and certain of its Officers and/or Administrative Representatives." *Id.* at 175. The plaintiffs challenge certain procedural requirements (hereinafter referred to as "procedures" or "regulations") which the Department has adopted to restrict PMAP payments for abortions.³ The district court found that, under these procedures, abortions would only be performed under PMAP in the following situations:

"1. There is documented medical evidence that continuance of the pregnancy may threaten the health or life of the mother;

representatives of a class. *Doe v. Wohlgemuth*, *supra* at 181-82. The plaintiffs have not appealed the refusal to grant them class-action status.

³ After the district court's order was entered in the case before us, the Commonwealth of Pennsylvania enacted an "Abortion Control Act," Act No. 209, Sess. of 1974, 35 P.S. §§6601 *et seq.* (Purdon's Pa. Legis. Serv. No. 4), effective date October 10, 1974. Like the regulations before us, but through rather different language, §7 of The Abortion Control Act restricted state subsidy of elective abortions. The enforcement of §7, together with certain other provisions of the same Act, was preliminarily enjoined by a three-judge district court in the Eastern District of Pennsylvania on October 10, 1974. *Planned Parenthood Ass'n of Southeastern Pa., Inc. v. Fitzpatrick*, Civ. No. 74-2440 (E.D. Pa., Oct. 10, 1974).

At oral argument, we asked counsel for the Commonwealth whether the Abortion Control Act had superseded the regulations at issue in this suit. He represented that the Act had not, and that the Commonwealth intended to enforce the regulations independently of the fate of the Abortion Control Act. For this reason, we have concluded that this suit has not been mooted by passage of the Abortion Control Act. *Cf. Abele v. Markle*, 369 F. Supp. 807, 809 (D. Conn. 1973).

2. There is documented medical evidence that the infant may be born with incapacitating physical deformity or mental deficiency; or

3. There is documented medical evidence that a continuance of a pregnancy resulting from legally established statutory or forcible rape or incest, may constitute a threat to the mental or physical health of a patient;

4. Two other physicians chosen because of their recognized professional competency have examined the patient and have concurred in writing; and

5. The procedure is performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals.'"

Id. at 175. See also *id.* at 175 n.1.⁴ In effect, these requirements define a compensable "therapeutic" abortion, and exclude payment for non-therapeutic, or "elective," abortions. The district court found that PMAP also covers the costs of prenatal care, childbirth, and post-partum treatment when the woman chooses to bear the child. *Id.* at 187.

The plaintiffs attack the Department's regulations both on the statutory ground that they are inconsistent with Title XIX (commonly called "Medicaid") of the Social Security Act (hereinafter sometimes referred to as

⁴ 62 P.S. §403 (1968) empowers the Department to establish "regulations, rules, and standards" as to the eligibility for assistance.

"the Act"), 42 U. S. C. A. §§1396, *et seq.* (1974),⁵ and also on the constitutional ground that they are inconsistent with Equal Protection Clause of the Fourteenth Amendment. In *Hagans v. Lavine*, 415 U. S. 528 (1974), the Supreme Court reversed the dismissal of a suit which challenged certain New York regulations under the Aid to Families with Dependent Children (AFDC) provisions of the Social Security Act, 42 U. S. C. A. §§601, *et seq.* (1974). Like Medicaid, AFDC is a voluntary participation program. See *Hagans v. Lavine*, *supra* at 530 n.1. Like the plaintiffs in the case now before us, the plaintiffs in *Hagans v. Lavine* challenged the New York regulations both on the ground that they were inconsistent with the Act and also on the ground that they violated the Equal Protection Clause of the Constitution. *Id.* at 530-31. The Court held that the constitutional claim was sufficient to confer jurisdiction on the district court under 28 U. S. C. § 1343(3),⁶ but required the district court on remand to consider the statutory claim first as a matter of pendant

⁵ Where code sections are referred to in this opinion without accompanying title references, "42 U. S. C. A. § (1974)" will be implicit.

⁶ The defendants in the case before us do not deny that the plaintiffs' constitutional arguments are sufficiently meritorious to confer jurisdiction on the district court under §1343(3). In view of the federal lower court decisions holding unconstitutional regulations similar to the Pennsylvania procedures now before this court, the constitutional "claim . . . [is] of sufficient substance to support federal jurisdiction [under 28 U. S. C. §1343(3)]." *Hagans v. Lavine*, *supra* at 536. See, *e. g.*, *Wulff v. Singleton*, 508 F. 2d 1211 (8th Cir. 1974); *Doe v. Westby*, 383 F. Supp. 1143 (D. S. D. 1974), and cases cited therein at 1145, *vacated and remanded* for further consideration in light of *Hagans v. Lavine*, *supra*, 43 U. S. L. W. 3499 (U. S., Mar. 17, 1975).

jurisdiction. *Hagans v. Lavine*, *supra*, at 536, 539-43. The Supreme Court has recently made it clear that in the Title XIX setting it also desires the statutory claim to be carefully considered before constitutional questions are reached. In *Westby v. Doe*, 43 U. S. L. W. 3499 (U. S., Mar. 17, 1975), vacating *Doe v. Westby*, 383 F. Supp. 1143 (D. S. D. 1974), a policy of the Social Services Department of the State of South Dakota, which limited payment under Title XIX for abortions, was under review. The district court had reached the question of the policy's constitutionality without any consideration of the policy's consistency with Title XIX, and the Supreme Court summarily vacated and remanded for reconsideration in the light of *Hagans v. Lavine*.⁷

In the case before us, the district court considered the statutory claim, but decided that the Pennsylvania procedures were consistent with the Social Security Act. See *Doe v. Wohlgemuth*, *supra* at 182-86. Turning to the allegations of unconstitutionality, the court declared the procedures to be in violation of the Equal Protection Clause. See *id.* at 186-92.⁸

Both arguments are renewed in this appeal. Because we believe that the principle of *Hagans v. Lavine* applies

⁷ The March 16, 1975, order of the Supreme Court (No. 74-684) reads, *inter alia*, as follows:

"The judgment is vacated and the case is remanded to the United States District Court for the District of South Dakota for further consideration in light of *Hagans v. Lavine*, 413 U. S. 528, 543-545 (1974)."

In *Doe v. Westby*, the district court's failure to address the statutory question may be explained by the parties' failure to raise it. See *Doe v. Westby*, *supra* at 1144.

⁸ Circuit Judge Weis dissented. 376 F. Supp. at 192.

to the courts of appeals as well as to the district courts, we will consider first whether the Pennsylvania procedures are consistent with the Social Security Act. See *Alma Motor Co., v. Timkin-Detroit Axle Co.*, 329 U. S. 129, 136-37 (1947); *United States v. Schiavo*, 504 F. 2d 1, 6-7 & n.11 (3d Cir. 1974).

II. SUPREME COURT PRECEDENT ON THE SCOPE OF STATE PREROGATIVE UNDER THE SOCIAL SECURITY ACT

The district court reasoned that the Social Security Act was designed to give the states great latitude in establishing eligibility for, and levels of, benefits. *Doe v. Wohlgemuth*, *supra* at 184-86. The court relied principally on *Dandridge v. Williams*, 397 U. S. 471 (1970), in which the Supreme Court held that the Social Security Act allowed the states to place a ceiling on the amount of benefits available to recipients of AFDC. See also *New York Dept. of Social Services v. Dublino*, 413 U. S. 405 (1973) (a work incentive program added to the AFDC provisions of the Act does not pre-empt state work incentive programs); *Jefferson v. Hackney*, 406 U. S. 535 (1972) (Texas' method of computation of AFDC benefits held consistent with the Act).

The Supreme Court has recognized an important qualification to the *Dandridge v. Williams* principle. In *King v. Smith*, 392 U. S. 309 (1968), the Court held invalid Alabama regulations which prevented AFDC benefits from flowing to the children of women cohabiting out of wedlock. The Court found the regulations to be inconsistent with congressional policy regarding AFDC recip-

ients. Similarly, in *Rosado v. Wyman*, 397 U. S. 397 (1970), the Court held invalid a New York law which lowered the "standard of need" for AFDC benefits, finding the law to be inconsistent with what the Court "fathom[ed] to be Congressional purpose" in enacting §402(a)(23) of the Social Security Act, 42 U. S. C. A. §602(a)(23) (1974). 397 U. S. at 414-15. *King* and *Rosado* demonstrate that, although the AFDC program is a "scheme of cooperative federalism," *King, supra* at 316, it is not a scheme of unlimited state discretion. Instead, Congress defined an area of state prerogative, the boundaries of which are defined by the congressional policies—both explicit and implicit⁹—found in the Social Security Act. The *King v. Smith* principle was reaffirmed by an eight-Justice majority in *Van Lare v. Hurley*, 43 U. S. L. W. 4592 (U. S., May 19, 1975) (finding New York's "lodger" regulations inconsistent with the Social Security Act). See also *Townsend v. Swank*, 404 U. S. 282 (1971); *Lewis v. Martin*, 397 U. S. 552 (1970).

⁹In *Rosado*, the Court struck down the New York legislation, even though no express language in §402(a)(23) required that result:

"These conclusions, if not compelled by the words of the statute or manifested by legislative history, represent the natural blend of the basic axiom—that courts should construe all legislative enactments to give them some meaning—with the compromise origins of §402(a)(23), set forth above." *Rosado, supra* at 415. See also *King v. Smith, supra* at 332 (relying on "[t]he pattern of this legislation," and "[t]he underlying policy and consistency in statutory interpretation").

III. TITLE XIX AS A "SCHEME OF COOPERATIVE FEDERALISM"

A. Areas of state discretion

Both parties agree with the district court that Title XIX, like AFDC, is a system of "cooperative federalism." *Doe v. Wohlgemuth, supra* at 184. The congressional desire to give the states considerable latitude in the administration of Title XIX is apparent throughout the statute. Funds are appropriated "[f]or the purpose of enabling each state, as far as practicable under the conditions in such State," to furnish medical assistance and other services. 42 U. S. C. A. §1396 (1974) (emphasis added). The states are free to choose whether they will participate at all; a participating state's program can cover only the "categorically needy," §1396a(a)(10); 45 C. F. R. 249.10(a)(1) (Rev. Ed., Oct. 1, 1973); or it can be extended to include the "medically needy" as well. Section 1396a(a)(10)(C); 45 C. F. R. §249.10(a)(1).¹⁰

¹⁰The phrases "categorically needy," referring to categories of recipients described in §1396a(a)(10)(A), and "medically needy," referring to recipients described in §1396a(a)(10)(C), appear in the Regulations. 45 C. F. R. §249.10(a)(1) (Rev. ed., Oct. 1, 1973). The categorically needy are persons receiving aid or assistance under Titles I, X, XVI, Part A of Title IV, and persons receiving supplemental income benefits under Title XVI. §1396a(a)(10)(A). The medically needy are persons who are not described in §1396a(a)(10)(A) "and who do not meet the income and resources requirements of the appropriate State plan, or the supplemental security income program under subchapter XVI of this chapter, as the case may be, as determined in accordance with standards prescribed by the Secretary—(i) for making medical assistance available to all individuals . . . who have insufficient

If a state extends coverage to the medically needy, it can either give the types of care and services listed in clauses (1) through (5) of §1396d(a) or give any seven of the types of care and services described in clauses (1) through (16) of §1396d(a).¹¹ Section 1396a(a)(13)(C). The statute literally abounds with other options which are open

income and resources to meet the costs of necessary medical and remedial care and service. . . ." §1396a(a)(10)(C).

Pennsylvania provides services to the "medically needy." 62 P.S. §441.1 reads as follows:

"The following persons shall be eligible for medical assistance:

"(1) Persons who receive or are eligible to receive cash assistance grants under this article;

"(2) Persons who meet the eligibility requirements of this article for cash assistance grants except for citizenship durational residence and any eligibility condition or other requirement for cash assistance which is prohibited under Title XIX of the Federal Social Security Act; and

"(3) The medically needy."

This last phrase is not otherwise defined, except by 62 P.S. §442.1:

"A person shall be considered medically needy if he:

"(1) Resides in Pennsylvania, regardless of the duration of his residence or his absence therefrom; and

"(2) Meets the standards of financial eligibility established by the department with the approval of the Governor. In establishing these standards, the department shall take into account (i) the funds certified by the Budget Secretary as available for medical assistance for the medically needy; (ii) pertinent Federal legislation and regulations; and (iii) the cost of living."

¹¹ PMAP extends coverage to the medically needy, giving them services (1) through (5), the same care and services as it is required to give the categorically needy. *Doe v. Wohlgemuth, supra* at 182-83.

to the participating states, all of which should help to tailor the state's program to the needs and conditions in that state, as contemplated in the appropriations section quoted above.

B. *Explicit statutory limitations on state discretion*

The story does not end with the litany of state discretion in A above. Many other provisions of the statute are designed to channel the state's program in directions which are consistent with the basic congressional objective of furnishing "medical assistance on behalf of families . . . whose income and resources are insufficient to meet the costs of necessary medical services." §1396.

1. *Required services*

Although the states were given a choice of services to provide to the medically needy, Congress requires the participating states to provide services (1) through (5) in §1396d(a) to the categorically needy. §1396a(a)(13)(B). Those services are the following:

"(1) Inpatient hospital services; (2) outpatient hospital services; (3) other laboratory and X-ray services; (4) skilled nursing facility services, screening and diagnosis of children, family planning services and supplies furnished to individuals of child bearing age; and (5) physicians' services furnished by a physician whether in the office, patient's home, hospital or elsewhere."

Doe v. Wohlgemuth, supra at 183.

2. *Equality requirements*

Another section of the Act requires the assistance made available to the categorically needy to be equitably

assistance on behalf of families . . . whose income and resources are insufficient to meet the costs of necessary medical services." Similar language appears in the definition in §1396a(a)(10)(C)(i) of the medically needy.¹² Limiting payments to those services which are "necessary" is also supported by recent amendments to Title XIX, which evidence a strong congressional interest in economy.¹³

2. Physicians' discretion

It is also apparent that Congress intended to place the primary authority for determining what treatment a particular recipient requires in the hands of the attending physician. The Senate Committee on Finance, which in 1965 reported favorably on the amendments to the Social

¹² Two district courts agree with the conclusion that Congress intended to fund only "necessary" medical expenses. *Roe v. Ferguson*, slip opinion at 6-8, Civ. A. No. 74-315 (S. D. Ohio, Sept. 16, 1974), *rev'd*, 43 U. S. L. W. 2452 (6th Cir., No. 74-2195, Apr. 28, 1975); *Klein v. Nassau Cty. Med. Ctr.*, 347 F. Supp. 496, 499 (E.D.N.Y. 1972), *vacated and remanded* for further consideration in light of *Roe v. Wade* and *Doe v. Bolton*, 412 U. S. 925 (1973). A third district court was more troubled by the absence of "necessary" as a limitation on available medical services. *Roe v. Norton*, *supra* at 728-29. The *Roe v. Norton* court appears to have overlooked §1396a(a)(31), but it made the important observation that Medicare (Title XVIII) excludes payment for services "which are not reasonable and necessary for the diagnosis or treatment of illness or injury or to improve the functioning of a malformed body member." 42 U. S. C. A. §1395y(a)(1) (1974). *Roe v. Norton*, *supra* at 729. The court found the legislative history of Medicare and Medicaid to support "a common interpretation of both titles." *Id.*

¹³ See note 14 below.

Security Act that included the creation of Title XIX, wrote:

"3. General provisions relating to the basic and voluntary supplementary plans

"(a) Conditions and limitations on payment for services

"(1) Physicians' role

"The committee's bill provides that the physician is to be the key figure in determining utilization of health services—and provides that it is a physician who is to decide upon admission to a hospital, order tests, drugs and treatments, and determine the length of stay."

S. Rep. No. 404, 89th Cong., 1st Sess., 1965 U. S. Code Cong. & Admin. News 1943, 1986. Although these remarks referred to the amendments to Medicare (Title XVIII), Congress understood Medicaid (Title XIX) as an expansion of the Medicare concept.

The same Committee wrote:

"The committee bill is designed to liberalize the Federal law under which States operate their medical assistance programs so as to make medical services for the needy more generally available. To accomplish this objective, the committee bill would establish, effective January 1, 1966, a new title in the Social Security Act—'Title XIX: Grants to the States for Medical Assistance Programs.'"

Id. at 2014. Thus, in *Roe v. Norton*, 380 F. Supp. 726 (D. Conn. 1974), the court discerned "the basic philos-

ophy of both the Medicare and Medicaid provisions, which emphasizes the wide discretion to be accorded physicians in treating their patients." *Id.* at 729.¹⁴

We must conclude that although Title XIX involves a system of "cooperative federalism," the congressional hand has been rather heavy in circumscribing the area of state prerogative.

¹⁴ The original Act required participating states to move toward, and eventually to furnish, "comprehensive care and services to substantially all individuals who meet the plan's eligibility standards with respect to income and resources," Social Security Amendments of 1965, Title XIX, §1903(e), 79 Stat. 350. In response to the rapidly inflating cost of medical services, this section was repealed in 1972, Social Security Amendments of 1972, Title II, §230, 86 Stat. 1410, but Congress made clear that in repealing §1903(e) it did not mean to alter the essential goals of the Medicaid system:

"Your committee also concluded that there is no simple or single solution to the problems now existing in the health care field which adversely affect these programs. But your committee does believe that there are modifications which can and should be made in these programs—changes which, while perhaps not very significant taken singly, as a whole, show great promise for making significant advances in accomplishing the goal of making these programs more economical and more capable of carrying out their original purposes." H. R. Rep. No. 92-231, 92nd Cong., 2d Sess., 1972 U. S. Code Cong. & Admin. News 4989, 4994. See Comment, Abortion on Demand in a Post-Wade Context: Must the State Pay the Bills?, 41 Fordham L. Rev. 921, 932 (1973). It is, therefore, proper to conclude that the original purpose of protecting the physician's discretion in treatment was not intended to be altered by the 1972 repeal of §1903(e). The 1972 amendments do, however, demonstrate a congressional intent that the Medicaid funds be used in the most economical manner possible.

IV. THE PENNSYLVANIA REGULATIONS' CONSISTENCY WITH TITLE XIX

Pennsylvania argues that its abortion regulations pursue congressional objectives. The state relies on the congressional mandate, noted above, to provide only necessary services, arguing that its regulations restrict payments for abortions to those which are "necessary," excluding those which are "elective." The argument proves too much. It is undoubtedly true that at the time a woman chooses to have a non-therapeutic abortion there is a greater quantum of personal freedom than at the time she has a therapeutic abortion or goes into labor. But there is also greater freedom of choice involved when one decides to have a tooth cavity filled than when one is forced to have the tooth extracted after it has abscessed. The state could not require Title XIX beneficiaries to await the abscess and undergo the extraction¹⁵ without damaging the broad purposes of Title XIX. And it is inconsistent with §1396a(a)(10)(B) and (C), which requires equality among beneficiaries, to force pregnant women to use the least voluntary method of treatment, while not imposing a similar requirement on other persons who qualify for aid.

The plaintiffs, on the other hand, place their reliance on the sections of the statute which require Pennsylvania to furnish them physicians' services, inpatient hospital services, outpatient services, and family planning ser-

¹⁵ We make this argument for illustrative purposes only. Although dental services may be provided under Medicaid, §1396d(a)(10), Pennsylvania does not do so. See note 11, *supra*.

vices.¹⁶ Because Pennsylvania has chosen to extend coverage to the medically needy, and has chosen not to exercise its option under §1396a(a)(13)(C)(ii) subsection (13)(C)(i) requires Pennsylvania to extend the services listed in the text to those plaintiffs who are on Public Assistance. For this reason, the plaintiffs are correct in arguing that the state is required to furnish all of them—both those who are categorically needy and those who are medically needy—the listed services.

In both the statute and the regulations of the Department of Health, Education and Welfare, physicians' services are defined by reference to the legal practice of medicine under state law. See §1396d(a)(5), referring to §1395x(r)(1); 45 C. F. R. §249.10(b)(5) (Rev. ed., Oct. 1, 1973). Since *Roe v. Wade*, 410 U. S. 113 (1973), and *Doe v. Bolton*, 410 U. S. 179 (1973), required the states to legalize the practice of elective abortion during the first two trimesters of pregnancy, the plaintiffs argue

¹⁶ The district court opinion does not indicate whether all the plaintiffs are categorically needy. On reading the complaint and accompanying affidavits, we have found that six of the 11 named plaintiffs receive AFDC, while five receive "Public Assistance." AFDC is part A of Title IV; its recipients are therefore "categorically needy" and the state must provide them with services (1) through (5) of §1396d(a). §§1396a(a)(10)(A) and (13)(B). The services listed in the text are clauses (5), (1), (2), and 4(c), respectively, of §1396d(a). The plaintiffs receiving Public Assistance, on the other hand, are not categorically needy, but only medically needy. The state could, therefore, deny them Medicaid altogether or provide services other than those listed in the text. See pp. 8-10, *supra*. Nevertheless, Pennsylvania extends equal coverage to the medically and categorically needy. See note 11, *supra*.

that elective abortion is now included in the definition of "physicians' services," and is therefore required to be furnished to the plaintiffs by §1396a(a)(13)(B) and (C).¹⁷ Similar arguments are advanced under the rubrics of "inpatient hospital services," "outpatient hospital services," and "family planning services."

Again, the argument proves too much. Elective cosmetic surgery, for example, is within the licensed practice of medicine in most, if not all, states. If the plaintiffs were correct, the state would be required to pay for such procedures, at the expense, perhaps, of many pressing medical needs of the poor.¹⁸ While §1903(e) of the original Act may have required the eventual finding of such procedures,¹⁹ its repeal indicates that Congress has no present intention of funding every procedure which falls within the legal practice of medicine. The states are given broad discretion to tailor their programs to their particular needs, and are required to economize and to fund only necessary medical expenses.

The problem for this court is to harmonize the various competing policies found in the Act and its history. A participating state should be able to adapt its program to its conditions and needs, and to limit the level of its Medicaid expenditures. This can be accomplished by giving the state broad discretion to define the medical conditions for which treatment is "necessary" within the mean-

¹⁷ See note 15, *supra*. A similar argument appears in Comment, *supra* note 14, at 937 n. 106.

¹⁸ New York's Medicaid program, for example, appears to exclude elective cosmetic surgery. See *Klein, supra* note 12, at 500. We have not been apprised whether Pennsylvania's does so or not.

¹⁹ See note 14, *supra*.

ing of the Act.²⁰ The proper treatment of such a condition, on the other hand, must be left to the judgment of the attending physician.²¹ See *Roe v. Norton, supra* at 729. Vesting such discretion in the physician is consistent with congressional objectives, see p. 13, *supra*; it is also a logical prerequisite to any program intended to bring valid medical assistance to the needy.^{21a} See §1396a(a) (19) (re-

²⁰ This court is not the first one to relate "necessary" to the conditions to be treated, rather than to the choice of treatment. See *Roe v. Norton, supra* at 729, *Klein v. Nassau Cty. Med. Ctr., supra* note 12, at 500.

²¹ The range of the doctor's discretion is in turn defined by each state's definition of the legal practice of medicine. See pp. 16-17, *supra*.

^{21a} In the Amicus Curiae Memorandum of the United States, filed in *New York, etc. v. Klein, et al.*, 412 U. S. 925 (1973), and relied on extensively in Judge Kalodner's dissent, this language appears at pages 7-8:

"But the state appellants have properly refused to intrude on the physician's judgment; they are completely 'guided by the ruling of the woman's physician as to whether an abortion is medically indicated' (J.S. 11). Thus the state appellants, in administering the New York Medicaid program, simply treat abortions in the same manner as other medical services: they defer to the medical judgment of the attending physician. If in the judgment of the patient's physician a particular medical service—whether an abortion or an appendectomy—is advisable to preserve health, that medical service is covered by the New York Medicaid program.

"The court below misunderstood the crucial role played by the woman's physician in the New York scheme. . . . [T]he district court simply assumed that the abortions sought were not medically indicated (J.S. App. A, 4a), but this was a medical judgment which the court was not in a position to make. Contrary to the court's assumption, it is possible that

quiring states to safeguard "the best interest of the recipients").

an attending physician would have concluded that an abortion was medically indicated with respect to one or more of the appellees.

"At bottom, therefore, appellees' argument apparently is that the Social Security Act requires reimbursement of the costs of all medically feasible abortions performed merely upon the demand of pregnant women. We see no statutory basis for this contention. An abortion is a serious medical matter which requires an exercise of medical judgment. A state need not provide medical assistance with respect to other medical services—such as, for example, a tonsillectomy—merely upon the patient's own request, and there is no apparent reason why abortions should be treated differently."

The Memorandum also quoted from *Doe v. Bolton, supra*, and *Roe v. Wade, supra*, as follows at pp. 8-9:

"Our conclusion is reinforced by this court's recent statements concerning the nature of the medical judgment here in question and the importance of that judgment to the expectant mother. In *Doe v. Bolton*, No. 70-40, decided January 22, 1973, slip op. at 11-12, the Court stated:

" . . . the medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient. All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment. And it is room that operates for the benefit, not the disadvantage, of the pregnant woman."

"And in *Roe v. Wade*, No. 70-18, decided January 22, 1973, slip op. at 49, the Court emphasized the critical importance of the attending physician's role by concluding that, as a constitutional matter, during the first trimester of pregnancy 'the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.' We agree that the role of the attending physi-

cian is and should be an important one, and we therefore believe that the state appellants have acted reasonably in preserving that role under the medicaid program."

Also, the M. S. A. of HEW policy, set forth in note 5 at 376 F. Supp. 179 and at 1 CCH Medicare and Medicaid Guide ¶14,511, also relied on in Judge Kalodner's dissent (see, for example, note 18 at page 16), does not support such procedures. It is noted that ¶14,515 of 1 CCH Medicare and Medicaid Guide, entitled "Equality of Medical Care," contains this wording of CCH, *inter alia*:

this would, in the particular instance, be consistent with sound medical practice. Gratuitous interference with medical decisions by doctors, on the other hand, would create a system of medical obstruction, rather than of medical assistance.

²² As stated by the Supreme Court in *Doe v. Bolton*, *supra*, at 192:

“Whether . . . ‘an abortion is necessary’ is a professional judgment that the . . . physician will be called upon to make routinely.”

and (C), since the "least voluntary method of treatment" requirement which the regulations impose on pregnant women is imposed on no other class of recipient. We therefore conclude that once the state has decided to finance full-term delivery and therapeutic abortion as methods for the treatment of pregnancy, it cannot decline to finance non-therapeutic abortions without violating the requirements of Title XIX. Since the decisions of the Supreme Court have forced the states to include elective abortion in the legal practice of medicine through the second trimester of pregnancy,²³ we also hold that the statute requires Pennsylvania to fund abortions through the end of the second trimester.²⁴

V. CONTRARY ARGUMENTS REJECTED

In reaching the above conclusion, we are not unmindful that other courts have found state provisions like Pennsylvania's to be consistent with the statutory scheme. In *Roe v. Ferguson*, 43 U.S. L.W. 2452 (6th Cir. No. 74-2195, Apr. 28, 1975), the Sixth Circuit reversed a district court's holding that Title XIX requires state funding for elective abortions. The court wrote:

"There is no indication that Congress intended to require the furnishing of abortion services not

²³ See *Roe v. Wade*, *supra* at 164; see also note 21, *supra*.

²⁴ Because the medical risk to a pregnant woman is somewhat enhanced during the second trimester, see *Roe v. Wade*, *supra* at 163, the state might require second trimester abortions funded by PMAP to be performed under physical conditions—*e.g.*, in a hospital—which protect the health of the aborting woman. §1396a (a) (19). See also *Roe v. Wade*, *supra* at 163; *Doe v. Bolton*, *supra* at 194-95.

required for the preservation of the health of the woman at a time when the performance of such abortions was illegal in most jurisdictions. In view of the disfavor shown toward abortions in other legislation, we are reluctant to infer that Congress intended to include required coverage for such controversial services without even mentioning the subject. When Congress passed the Family Planning Services and Research Act of 1970, 42 U.S.C. §§300a et seq., providing funds to states opting to participate in creating comprehensive programs of family planning services, abortion was specifically excluded as a means of family planning to be recognized under the Act. 42 U.S.C. §300a-6.

"In establishing the Legal Services Corporation system, Congress again provided that no funds of the Corporation could be used for legal assistance for those seeking to procure a non-therapeutic abortion. 42 U.S.C. §2996f (b) (8)." *Id.*

See also *Doe v. Rose*, *supra* at 1114-15 ("prefer[ring]" to decide the case on constitutional grounds in light of the Act's silence on the abortion question); *Doe v. Wohlgemuth*, *supra*. We find none of these arguments to be persuasive. It is impossible to believe that in enacting Title XIX Congress intended to freeze the medical services available to recipients at those which were legal in 1965. Congress surely intended Medicaid to pay for drugs not legally marketable under the FDA's regulations in 1965 which are subsequently found to be marketable. We can see no reason why the same analysis should not apply to the Supreme Court's legalization of elective abortion in 1973. The inference which the Sixth Circuit drew

from legislation in which Congress prohibited expenditure for non-therapeutic abortions also seems unwarranted. Congress could have proscribed payment for elective abortions when it passed the Family Planning Services and Research Act of 1970, or in 1972 when it amended Title XIX, but it did not do so. See Comment, *supra* note 14, at 933 n.80. Furthermore, abortions are hardly a desirable method of family planning; this consideration may explain the provisions of the Family Planning Services and Research Act relied upon by the Sixth Circuit.

VI. CONCLUSION AND DISTRICT COURT ACTION ON REMAND

For the foregoing reasons, the plaintiffs are entitled to a declaratory judgment declaring that the Pennsylvania regulations are inconsistent with Title XIX of the Social Security Act, 42 U.S.C.A. §1396 *et seq.*, during the first and second trimesters of pregnancy.

In *Hagans v. Lavine*, *supra* at 543-44, the Supreme Court pointed out that a single district judge can grant both declaratory and injunctive relief on statutory grounds in a case such as this, using this language (415 U.S. 543):

"Given a constitutional question over which the District Court had jurisdiction, it also had jurisdiction over the 'statutory' claim. See *supra*, at 536. The latter was to be decided first and the former not reached if the statutory claim was dispositive. [Citing cases.] The constitutional claim could be adjudicated only by a three-judge court, but the statutory claim was within the jurisdiction of a single district judge. [Citing cases.] Thus, the District Judge, sitting alone, moved directly to the statutory claim. His de-

cision was appealed to the Court of Appeals, although had a three-judge court been convened, an injunction issued, and the statutory ground alone decided, the appeal would be only to this Court under 28 U.S.C. §1253."

The court went on to state at 543-45:

"The procedure followed by the District Court—initial determination of substantiality and then adjudication of the 'statutory' claim without convening a three-judge court— . . . accurately reflects the recent evolution of three-judge-court jurisprudence

"It is true that the constitutional claim would warrant convening a three-judge court and that if a single judge rejects the statutory claim, a three-judge court must be called to consider the constitutional issue. Nevertheless, the coincidence of a constitutional and statutory claim should not automatically require a single-judge district court to defer to a three-judge panel, which, in view of what we have said in *Rosado v. Wyman*, *supra*, could then merely pass the statutory claim back to the single judge. [Citing cases.] 'In fact, it would be grossly inefficient to send a three-judge court a claim which will only be sent immediately back. This inefficiency is especially apparent if the single judge's decision resolves the case, for there is then no need to convene the three-judge court.' [Citing case.] Section 2281 does not forbid this practice, and we are not inclined to read that statute 'in isolation with mutilating literalness'"

We have quoted the foregoing because we hold at this time that the majority opinion in *Murrow v. Clifford*, 502 F. 2d 1066 (3d Cir. 1974), will not be followed insofar as it is inconsistent with (a) part II of *Hagans v. Lavine, supra*²⁵ and (b) this opinion.

Because of our power to modify the May 28, 1974, Supplemental Order of the district court under 28 U.S.C. §2106, we will direct that it be modified to read as follows, and the case will be remanded to the district court so that the three-judge court can be dissolved, the assigned district judge to take any further action required consistent with this opinion:

“ . . . IT IS HEREBY ADJUDGED AND DECREED that the Regulations and Procedures of the Department of Public Welfare of the Commonwealth of Pennsylvania, as they apply to reimbursement for abortions performed within the first two trimesters of pregnancy, are invalid because they are inconsistent with Title XIX of the Social Security Act, 42 U.S.C. §1396, *et seq.* In all other respects, Plaintiffs' Requests for Declaratory Judgment are denied.”

Costs shall be taxed against defendant-appellants at No. 74-1726.

To the Clerk:

Please file the foregoing opinion.

Circuit Judge

²⁵ Cf. *Philbrook v. Glodgett*, 43 U. S. L. W. 4702, note 8 at 4704 (U. S., No. 73-1820, June 9, 1975).

KALODNER, *Circuit Judge*, dissenting.

The majority holds that “the plaintiffs are entitled to a declaratory judgment declaring that *the Pennsylvania regulations are inconsistent with Title XIX of the Social Security Act*, 42 U.S.C.A. §1396 *et seq.*; during the first and second trimesters of pregnancy,” and further concludes that “it is unnecessary to reach the plaintiffs' constitutional arguments.” (emphasis supplied).

I dissent from the majority's holding that “the Pennsylvania regulations are inconsistent with the Social Security Act.” I disagree, too, with its conclusion that “it is unnecessary to reach the plaintiffs' constitutional arguments.”

I would affirm the holding of the three-judge court that the “*Pennsylvania Regulations do not conflict with Title XIX of the Social Security Act.*”¹ (emphasis supplied).

I would also reverse the holding of the court below that “the Regulations and/or Procedures of the Pennsylvania Medical Assistance Program are unconstitutional because they are in violation of the Equal Protection Clause since they create an unlawful distinction between individual women who choose to carry their pregnancies to birth, and indigent women who choose to terminate their pregnancies by abortion.”²

I would, however, enjoin enforcement of the Regulations on the ground that they are being administered in violation of the Equal Protection Clause of the Fourteenth

¹ 376 F. Supp. 173, 186 (W.D. Pa. 1974).

² *Id.* at 191.

Amendment in that they are *not enforced* against welfare recipients who threaten suit when they are denied reimbursement for non-therapeutic abortions, and *enforced only* against those who do not threaten suit. It is settled that State administrative procedures which are *per se* valid and constitutional may nevertheless be enjoined when they are unconstitutionally applied.

The views expressed will be discussed *seriatim* as follows:

I. THE PENNSYLVANIA REGULATIONS' CONSISTENCY WITH TITLE XIX

This must be said in preface:

First, two other Circuit Courts which have spoken to the question have expressly refused to subscribe to the view now espoused by the majority. *Rose v. Ferguson*, 43 U.S.L.W. 2452 (6th Cir. April 28, 1975); *Doe v. Rose*, 499 F. 2d 1112 (10th Cir. 1974).

Second, the majority's holding of inconsistency is nourished only by a single district court decision, *Roe v. Norton*, 380 F. Supp. 726 (D. Conn. 1974).

Third, our brother Weis, a member of the three-judge court below, specifically expressed his concurrence with its holding that the Regulations are not inconsistent with Title XIX, albeit he dissented from its holding that the Regulations are unconstitutional.³

³ Judge Weis stated: "I also concur in the court's holding that the State regulations are not in conflict with the federal statute." 376 F. Supp. at 192 n.1.

Fourth, the specific question "[w]hether the Social Security Act requires a federally-funded state medicaid program to pay for abortions that are not medically indicated," was answered in the negative by the Solicitor General of the United States in a "Memorandum for the United States as Amicus Curiae."⁴ (emphasis supplied).

Fifth, The Medical Assistance Services Administration in the Social and Rehabilitation Service of the Department of Health, Education, and Welfare, which administers the Medicaid aspect of the Social Security Act, has made it clear in a statement on its "position" on abortion, that a state participating in the Medicaid program has the *option* of funding abortions, and, if it does, "the Federal Government shares the costs with the State."⁵

The points outlined will be more fully developed after the following discussion of the critical provisions of Title XIX and the Regulations.

⁴ The "Memorandum" was filed in *Commissioner of Social Service of New York et al. v. Klein and Nassau County Medical Center et al. v. Klein et al.*, 412 U.S. 925 (1973) (hereinafter cited as *Amicus Curiae Memorandum*). It recites that "[t]his memorandum is filed in response to the Court's invitation to the Solicitor General to file a memorandum expressing the views of the United States on the statutory issues." *Id.* at 1.

⁵ 1 CCH Medicare and Medicaid Guide ¶14,511; see too 41 Penna. Bulletin 2207 n.4 (Sept. 29, 1973) (Opinion Letter, dated Aug. 6, 1973, from Israel Packel, Atty. Gen. of Penna., to Helene Wohlgemuth, Sec'y of Penna. Dept. of Public Welfare, on the *Effect of United States Supreme Court Decisions on Department of Public Welfare Medical Assistance Regulations on Abortions*; noted in the opinion of the district court. 376 F. Supp. at 178 n.5.

Title XIX of the Social Security Act, popularly known as Medicaid, and the federal regulations promulgated thereunder, establish a comprehensive system of health care for the needy. In the spirit of "cooperative federalism," Congress annually appropriates funds to enable each state, "as far as practicable under the conditions in such state, to furnish . . . medical assistance" to designated families and individuals "whose income and resources are insufficient to meet the costs of *necessary medical services*." 42 U.S.C. §1396. (emphasis supplied).

A state is not required to participate in the Medicaid Program, but if it chooses to become a participant, it must submit a plan for medical assistance to the Department of Health, Education, and Welfare ("HEW") for approval, which is conditioned upon the plan comporting with the provisions of Title XIX. *See* 42 U.S.C. §§1396, 1396a (b). Thereafter, operation of the program is under state direction with continuing eligibility for federal grants subject to the state's compliance with the originally approved plan and federal regulations. *See* 42 U.S.C. §1396c; 45 C.F.R. §§246-280.

As dictated by the federal statute and regulations, a state's Medicaid program *must* provide medical assistance⁶ to the "categorically needy," as spelled out by the majority. *See* 42 U.S.C. §1396a (a) (10) (A).

A state *may* decide to limit coverage to the "categorically needy," or it *may* decide to include within the

⁶ "Medical assistance" is functionally defined by the Social Security Act in terms of part or total payment for seventeen different types of services reimbursable under the Medicaid Program. 42 U.S.C. §1396d (a).

scope of its Medicaid program other groups or individuals in need of "necessary medical services."

A state whose medical assistance program extends beyond the "categorically needy," has the option of providing the five services made mandatory as to those in the "categorically needy" class, or selecting any seven of the services listed in clauses (1) through (16) of §1396d (a). *See* 42 U.S.C. §1396a (a) (13).

The five services made mandatory as to the "categorically needy" (included in Pennsylvania's Medicaid program) are:

"(1) inpatient hospital services (other than services in an institution for tuberculosis or mental diseases);

"(2) outpatient hospital services;

"(3) other laboratory and X-ray services;

"(4) (A) skilled nursing facility services (other than services in an institution for tuberculosis or mental diseases) for individuals 21 years of age or older (B) effective July 1, 1969, such early and periodic screening and diagnosis of individuals who are eligible under the plan and are under the age of 21 to ascertain their physical or mental defects, and such health care, treatment, and other measures to correct or ameliorate defects and chronic conditions discovered thereby, as may be provided in regulations of the Secretary; and (C) family planning services and supplies furnished (directly or under arrangements with others) to individuals of child-bearing age (including minors who can be considered to be sex-

ually active) who are eligible under the State plan and who desire such services and supplies;

"(5) physicians' services furnished by a physician . . . whether furnished in the office, the patient's home, a hospital, or a skilled nursing facility, or elsewhere," §1396d(a).

A state is required to include in its Medicaid plan "reasonable standards . . . for determining eligibility for and the extent of medical assistance under the plan which . . . are consistent with the objectives of [Title XIX]. . . ." 42 U.S.C. §1396a(a)(17). A state may properly limit the coverage of its Medicaid program to the costs of "necessary medical services." A state plan for medical assistance *must* provide that a method of "utilization review" be established for each item of care or services listed in 42 U.S.C. §1396d(a) so as "to safeguard against unnecessary utilization of such care and services. . . ." 42 U.S.C. §1396(a)(30) [sic*]; 45 C.F.R. §250.20(a). The federal regulations specifically authorize "[a]ppropriate limits . . . placed on services based on such criteria as medical necessity or those contained in utilization or medical review procedures." 45 C.F.R. §249.10(a)(5)(i).

Furthermore, any medical services made available to a "categorically needy" person must not be less in "amount, duration, or scope" than that provided other groups or individuals. Services made available to a group other than the "categorically needy" must be equal in "amount, duration, and scope" for all individuals within

* Citation used by Judge Kalodner appears to be incorrect and the correct citation should read §1396(a)(30).

the group, 42 U.S.C. §1396a(a)(10), but may be less than or differ from those benefits provided the "categorically needy."⁷

In summary outline, Title XIX provides for a federal-state funded program which permits each state to decide whether it will participate and what services it will provide, and to whom, subject to the requirement that certain welfare recipients must be included and certain items of basic medical care must be furnished.⁸

The Pennsylvania Medical Assistance Program ("PMAP") was designed to comport with the requirements of Title XIX. It provides, *inter alia*, for reimbursement for medical services to the "categorically needy," and the "medically needy," affording to the latter the five services made mandatory as to the "categorically needy,"⁹ earlier here spelled out.

Regulations pertaining to the administration of PMAP provide for reimbursement of costs of an abortion *only* where "there is documented medical evidence," submitted by the attending physician and two other physicians, that "continuance of the pregnancy may threaten the health or life of the mother," or, that "the infant may be born with incapacitating physical deformity or mental deficiency," or, that "a continuance of pregnancy resulting from legally established statutory or forcible rape or incest, may constitute a threat to the mental or physical health of a patient," and "the procedure is performed in

⁷ See Stevens and Stevens, *Medicaid: Anatomy of a Dilemma*, 35 Law & Contemp. Prob. 348, 363 (1970) (hereinafter cited as Stevens).

⁸ 1 CCH Medicare and Medicaid Guide, ¶14,010.

⁹ *Id.* at ¶15,632; 62 P.S. §§432, 441.1.

a hospital accredited by the Joint Commission on Accreditation of Hospitals.”

The recited provisions of the Regulations, as the majority has well said, “in effect . . . define a compensable ‘therapeutic’ abortion, and exclude payment for non-therapeutic, or ‘elective’ abortions.”

The plaintiff-welfare recipients contended below that the cited Regulations contravene Title XIX, because, in their view, *an abortion*, whether it be therapeutic or non-therapeutic, is a “*necessary medical service*” within the meaning of the Title and the purview of its categories of “physicians’ services”; “inpatient and outpatient hospital services”, and “family services.”

In disposing of these contentions, the court below said:

*“Congress was silent with respect to specific authorization of medical assistance for abortions. Pennsylvania standards must be scrutinized without curtailment by Congressional action and the State Regulations and/or Procedures must be given great latitude in providing for the administration of the Program. We, therefore, feel compelled to find Pennsylvania’s Regulations do not conflict with Title XIX of the Social Security Act.”*¹⁰ (emphasis supplied).

The foregoing holding was prefaced by this significant statement:

“But, even if we assume, as do the Plaintiffs, that abortion payments are clearly authorized under

¹⁰ 376 F. Supp. at 185-86.

Title XIX of the Social Security Act, nevertheless, Congress has given the States great latitude in establishing standards for the administration of the various plans, under the doctrine of a ‘*scheme of cooperative federalism*.’ ”¹¹

The distilled essence of the holding below is that Title XIX does not, *per se*, require a Medicaid state to pay for a non-therapeutic abortion, and accordingly the Pennsylvania Regulations denying payment for such an abortion does not conflict with Title XIX.

The distilled essence of the majority’s holding is that Title XIX, *per se*, requires a Medicaid state to pay for a non-therapeutic abortion “once the state had decided to finance full-term delivery and therapeutic abortion as methods for the treatment of pregnancy.”

The Achilles’ heel of the majority’s holding is its *non-sequitor* application of recent Supreme Court decisions,¹² in which no issue as to the sweep of Title XIX was involved, and the critical question presented related *only* to constitutional challenges to state statutes making performance of a non-therapeutic abortion a crime.

The majority’s application of these Supreme Court decisions is manifested by its following statement:

“Since the decisions of the Supreme Court have forced the states to include elective abortion in the legal practice of medicine through the second trimester of pregnancy, we also hold that the statute

¹¹ *Id.* at 184.

¹² *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973).

[*Title XIX*] requires Pennsylvania to fund abortions through the end of the second trimester." (emphasis supplied).

It need only be said on the score of the foregoing, that the 1973 Supreme Court decisions, which make legal a physician's performance of an elective abortion, cannot be utilized to construe the earlier enacted Title XIX¹³ as requiring a Medicaid state to pay the expenses of such an abortion, albeit these decisions are applicable to the presented issue of constitutionality of the Pennsylvania Regulations which has been avoided by the majority.

As earlier noted, two other circuits which have spoken to the Title XIX issue have subscribed to the holding of the court below and expressly refused to subscribe to the view espoused by the majority.

In *Doe v. Rose*, 499 F. 2d 1112 (10th Cir. 1974), constitutional and statutory challenges were presented to the Utah Department of Social Services' "informal policy" concerning abortions.

The "informal policy" provided that a pregnant woman was not entitled to an abortion at the expense of Utah's Medicaid program without prior approval as a "therapeutic abortion" by the Executive Director of the Department. The "informal policy" defined a "therapeutic abortion" as one necessary to save the life of the expectant mother or to prevent serious and permanent impairment to her physical health, and none other.

The district court granted the plaintiffs' request for an injunction restraining enforcement of the "informal

¹³ Title XIX was first enacted in 1965, and amended in 1972.

policy" on both statutory and constitutional grounds. The Tenth Circuit, on review, affirmed on the constitutional grounds only, declaring that it preferred to do so for these reasons:

"At the outset, so far as we are advised the applicable federal statutes regarding Medicaid make no mention, as such, of abortions. Hence, we lack specific guidance as to whether Congress intended that abortions be covered by Medicaid and, if so, more critically, *which* abortions were to be covered by medicaid benefits. . . .

"The implementing state statutes of Utah, as well as the latter's state plan, submitted to and approved by the federal authorities, also make no mention, as such, of abortions. Hence, this is not an instance where the administrative policy under attack is mandated by either state or federal statute. By the same token, *in our view there is nothing in either the federal or state statutes which specifically bars the policy here followed by Rose*. In this regard, we are mindful of the Supreme Court's preference for statutory, as opposed to constitutional, resolution of welfare controversies. See *Wyman v. Rothstein*, 398 U.S. 275, 90 S. Ct. 1582, 26 L. Ed. 2d 218 (1970). Nevertheless, in light of the applicable statutes' complete silence on the abortion question, we prefer to dispose of the present appeal on constitutional grounds, rather than by any strained effort to show that the policy in question is, in effect, though not in so many words, prohibited by either federal or state statute. . . ." 499 F. 2d at 1114-1115. (emphasis supplied).

The Sixth Circuit, in *Roe v. Ferguson*, 43 U.S.L.W. 2452 (6th Cir. April 28, 1975), reversed the district court's holding that Title XIX was contravened by administrative rulings by the Auditor of the State of Ohio and an Ohio statute which prohibited reimbursement for elective abortions to state Medicaid recipients.

In doing so, the Court expressly declared its accord with *Doe v. Rose*, *supra*, and the holding of the court below in the instant case, on the Title XIX issue, in the following statement:

"We are in accord with the decisions which have found no conflict between state restrictions of of Medicaid payments to elective abortions and the provisions of the Social Security Act. There is no indication that Congress intended to require the furnishing of abortion services not required for the preservation of the health of the woman at a time when the performance of such abortions was illegal in most jurisdictions. In view of the disfavor shown toward abortions in other legislation, we are reluctant to infer that Congress intended to include required coverage for such controversial services without even mentioning the subject. When Congress passed the Family Planning Services and Research Act of 1970, 42 U.S.C. §§300a et seq. providing funds to states opting to participate in creating comprehensive programs of family planning services, abortion was specifically excluded as a means of family planning to be recognized under the Act. 42 U.S.C. §300a-6.

"In establishing the Legal Services Corporation system, Congress again provided that no funds of the

Corporation could be used for legal assistance for those seeking to procure a non-therapeutic abortion. 42 U.S.C. §2996f (b) (8).

"In view of this evidence of the Congressional attitude toward abortion as a family planning technique or as an acceptable medical service in general, it is difficult to construe the silence of Congress in Title XIX as an endorsement of the view that non-therapeutic abortions are included in the 'necessary medical services' required to be furnished by a state participating in Medicaid. This is not to say that Congress may constitutionally exclude such abortion services from coverage in the Medicaid program. In the absence of a legislative history indicating a contrary position, however, we cannot say that the statute itself prohibits such an exclusion." (emphasis supplied).¹⁴

As earlier stated, the majority's holding is nourished only by a single district court case—*Roe v. Norton*, *supra*. There, the narrow issue presented was whether Title XIX prohibited "federal reimbursement for the expenses of an [elective] abortion," and thus compelled a Medicaid state to deny reimbursement for such an abortion. The issue arose by reason of the adoption of a regulation by the Connecticut Welfare Department banning reimbursement

¹⁴ It must be noted that the Court in *Roe* remanded the case for consideration of the constitutional issue by a three-judge court, and that the Tenth Circuit in *Doe v. Rose* ruled that the denial of benefits for a non-therapeutic abortion was unconstitutional, albeit, it reversed the district court's ruling there that the denial contravened Title XIX. The stated unconstitutionality ruling will be discussed later.

for non-therapeutic abortions because of its belief that it was *compelled* to do so by Title XIX.¹⁵ The district court ruled that "Title XIX must be construed to *permit* payment for elective abortions." In doing so, the district court further held that the Title "must be construed . . . to *prohibit* state regulations that impair a woman's exercise of her right in consultation only with her physician to have an [elective] abortion."¹⁶

It must immediately be noted that the stated further holding is dictum under the prevailing circumstances.

Coming now to the majority's disregard of the views expressed by the Solicitor General of the United States, and the federal agency which administers the Medicaid program, on the score of the reach of Title XIX, in its holding that "the Pennsylvania Regulations are inconsistent with Title XIX":

As already stated, the Solicitor General in his Amicus Curiae Memorandum¹⁷ specifically opined that "the Social Security Act does *not* require a federally-funded state medicare program to pay for abortions that are not medically indicated," and, the federal agency which administers the Medicaid program, in a statement on its "position" on abortion,¹⁸ made it clear that a Medicaid state has the

¹⁵ 380 F. Supp. 726, 728 n.2.

¹⁶ *Id.* at 730.

¹⁷ See note 4, *supra*.

¹⁸ The Medical Assistance Services Administration in the Social and Rehabilitation Service of the Department of Health, Education, and Welfare, which administers the Medicaid aspect of the Social Security Act, made the following response to an inquiry of the Attorney General of Pennsylvania anent federal sharing with a Medicaid state of abortion payments:

option of funding abortions, and if it does, "the federal Government shares the costs with the State."

A more recent statement made by the Social and Rehabilitation Service, under which the Medical Services Administration operates, further reflects the Government's view that Title XIX does not *exclude* non-therapeutic abortions.

The statement declares in relevant part that "under Title XIX, federal financial participation is *available* for *any* abortions *for which* the state welfare agency provides."¹⁹ (emphasis supplied).

"The position taken by the Medical Services Administration on abortion is that the Social Security Act and the HEW Regulations provide for Federal matching of State expenditures for all kinds of medical care and services, including inpatient hospital services, outpatient hospital services, physician services, drugs, etc. *If the State Medicaid program pays for these services, whether for abortion, or any other medical procedure, the Federal Government shares the costs with the State.*" (emphasis supplied). See too, note 5, *supra*.

¹⁹Roe v. Norton, 380 F. Supp. 726, 730 (D. Conn. 1974) (citing the view of an associate commissioner of the Social and Rehabilitation Service).

As another indication of the Government's view that Title XIX, as enacted, *permits* but does not *require* funding of non-therapeutic abortions, the Social and Rehabilitation Service has proposed to redefine the Title's "family planning services" provisions so that "neither therapeutic nor non-therapeutic abortions are to be considered as an item of family planning services for which Federal financial participation . . . is available . . . However, *Federal matching is available . . . for abortions when provided under the State plan as a physicians' services or otherwise.*" Proposed HEW rule 45 C. F. R. §249.10(b)(4)(iii), 339 Fed. Reg. 42919, 42920 (December 9, 1974) (emphasis supplied).

The foregoing evidences the federal Government's view that Title XIX *neither prohibits, nor requires* a Medicaid state's payment for non-therapeutic abortions, and that such states are free to either provide or deny at their option medical assistance for such an abortion.

It is undisputed that the Government has pursued a policy of sharing in a state's funding of non-therapeutic abortions, pursuant to its stated position.

The majority's disregard of the stated views of the federal agencies concerned with administration of Title XIX, contravenes the settled rule that construction of a statute by an agency charged with its administration should be accorded great deference, absent compelling indications that it is clearly wrong.²⁰

This, too, must be said:

It cannot be gainsaid that Title XIX does not make any reference to abortions—therapeutic or elective—and that its legislative history is similarly silent on that score.

In recognition of that fact, the majority concededly reached its holding as to the force of Title XIX with respect to abortions—therapeutic and elective—by “interpreting”²¹ Title XIX to support its conclusion. In doing so it said:

²⁰ *Lewis v. Martin*, 397 U.S. 552, 559 (1970); *Rosado v. Wyman*, 397 U.S. 397, 415 (1970); *Federal Housing Administration v. Darlington, Inc.*, 358 U.S. 84, 90 (1958); *Bernstein v. Ribicoff*, 299 F. 2d 248, 253 (3d Cir.), *cert. denied*, 369 U.S. 887 (1962).

²¹ The concession is expressed in the majority's following statement:

“*By interpreting Title XIX as we have, we thus avoid an inquiry into the constitutionality of the Pennsylvania procedures. . .*” (emphasis supplied).

“It is *impossible to believe* that in enacting Title XIX Congress intended to freeze the medical services available to recipients as those which were legal in 1965.”

The quoted statement clearly falls into the category of argument criticised as a “departure from ordinary principles of statutory interpretation,” in the recent case of *Burns v. Alcala*, 43 U.S.L.W. 4374 (decided March 18, 1975).²²

²² In *Burns v. Alcala*, the Supreme Court was presented with the question: “whether States receiving federal financial aid under the program of Aid to Families with Dependent Children (AFDC) *must* offer welfare benefits to pregnant women for their unborn children.” 43 U.S.L.W. at 4374-75 (emphasis supplied). Viewing the matter as “one of statutory interpretation,” the Court held that the term “dependent children,” as presently defined by the Social Security Act does not encompass “unborn children,” and therefore a state is not required by the Act to include unborn children as those eligible for AFDC benefits, but may do so, in which event federal matching funds would be available. (The Court remanded the case, however, for consideration of the constitutional issues).

After reviewing the provisions of the Act governing AFDC eligibility, the Court stressed that its prior decisions in this area had not established “a special rule of [statutory] construction.” *Id.* at 4375. Lower courts, in considering the same issue, were admonished for departing from the “ordinary principles of statutory interpretation” as evidenced by their holdings that “persons who are *arguably* included in the federal eligibility standard *must be* deemed eligible unless the Act or its legislative history clearly exhibits an intent to exclude them from coverage, in effect creating a presumption of coverage when the statute is ambiguous.” *Id.* at 4376 (emphasis supplied).

In the instant case, the majority likewise departs from the “ordinary principles of statutory interpretation” by construing

The same is true with respect to this further conclusory statement of the majority:

"We therefore conclude that *once* the state has decided to finance full-term delivery and therapeutic abortion as methods for the treatment of pregnancy, it *cannot decline to finance non-therapeutic abortions without violating the requirements of Title XIX.*" (emphasis supplied.)

It may be noted at this juncture that the stated construction of Title XIX is sharply at odds with that of the Solicitor General in his Amicus Curiae Memorandum.

In spelling out his views as to "the extent of the 'medical assistance' which must be provided" under Title XIX, the Solicitor General said:

"Furthermore, a participating state *need not pay for every kind of medical treatment* encompassed within those five categories. The state is required only to set 'reasonable standards' . . . for determining . . . the extent of medical assistance . . . *consistent with the objectives* of [Title XIX]' 42 U.S.C. 1396a (a) (17)," and, "[w]e disagree" with the contention "that the denial of assistance with respect to non-medically indicated abortions is not 'reasonable' under 42 U.S.C. 1396a (a) (17)."

I agree with the Solicitor General's rejection of the contention that the denial of assistance with respect to non-medically indicated abortions is not reasonable under Title XIX.

Title XIX as *requiring* payment for non-therapeutic abortions inasmuch as such abortions are "arguably" a "necessary medical service" reimbursable under the Medicaid Program.

The Title's use of the phrase "amount, duration and scope of services" in its various provisions, indicates that "Congress anticipated that states would limit the types of services they covered . . ."²³

In summary, I would for all the reasons stated in the foregoing discussion, affirm the holding of the court below that the "*Pennsylvania Regulations do not conflict with Title XIX of the Social Security Act.*" (Emphasis supplied.)

II. THE CONSTITUTIONAL ISSUE

The court below held that the Pennsylvania Regulations "are unconstitutional because they are in violation of the Equal Protection Clause since they create an unlawful distinction between individual women who choose to carry their pregnancies to birth, and indigent women who choose to terminate their pregnancies by abortion."²⁴

It premised its holding on these grounds:

"Under traditional Equal Protection standards, once the State chooses to pay for medical services rendered in connection with the pregnancies of some indigent women, it cannot refuse to pay for the medical services rendered in connection with the pregnancies of other indigent women electing abortion, unless the disparate treatment supports a legitimate State interest,"²⁵ and, "the State's

²³ Butler, The Right to Abortion under Medicaid. 7 Clearinghouse Review 713, 718 (1974).

²⁴ 376 F. Supp. at 191.

²⁵ *Id.* at 186.

decision to limit coverage to 'medically indicated' abortions, as arbitrarily determined by it, is a limitation which promotes no valid State interest."²⁶

I would reverse the unconstitutionality holding of the court below, albeit the Eighth and Tenth Circuits and four district courts²⁷ have held unconstitutional regulations and statutes similar to the Pennsylvania Regulations, and no court has held to the contrary.²⁸

I agree with the dissenting view below that "there is no constitutional requirement that the State must finance exercise of a 'fundamental' right, nor does a classification which distinguishes between medically necessary

²⁶ *Id.* at 191.

²⁷ See *Wulff v. Singleton*, 508 F. 2d 1211 (8th Cir. 1974), cert. granted, 43 U.S.L.W. 3670 (June 24, 1975); *Doe v. Rose*, 499 F. 2d 1112 (10th Cir. 1974); *Doe v. Myatt* Civ. No. A3-74-48 (D. N.D. Jan. 27, 1975); *Doe v. Westby*, 383 F. Supp. 1143 (D. S.D. 1974), vacated and remanded for consideration of the statutory grounds, 43 U.S.L.W. 3499 (March 17, 1975); *Doe v. Rampton*, 366 F. Supp. 189 (D. Utah 1973); *Klein v. Nassau County Medical Center*, 347 F. Supp. 496 (E.D. N.Y. 1972), vacated and remanded for further consideration in light of *Roe v. Wade* and *Doe v. Bolton*, 412 U.S. 925-26 (1973).

²⁸ The Sixth Circuit, however, remanded for consideration by a three-judge court the issue of constitutionality of an Ohio statute and administrative policy similar to the Pennsylvania Regulations after expressing its "disagreement with the Eighth Circuit's ruling in *Wulff v. Singleton*, 508 F. 2d 122 (8th Cir. 1974), that the unconstitutionality of this type of statute is so 'obvious and patent' as to obviate the need for a three-judge court." *Roe v. Ferguson*, 43 U.S.L.W. 2452 (April 28, 1975).

and non-necessary abortions offend the Equal Protection Clause."²⁹

The sum of the holding of the court below is that since Pennsylvania's Medicaid program pays for medical services incident to full-term delivery, and/or therapeutic abortions, it violates the Equal Protection Clause when it denies payment for an elective abortion.

The holding reflects the court's subscription to the plaintiffs' contention that an elective abortion is one way of handling a pregnancy and accordingly such an abortion falls within the category of "necessary medical care" extended by Pennsylvania to pregnant eligibles. It also reflects rejection of Pennsylvania's contentions that its Medicaid program provides only for extension of "necessary medical care," and its payment for a full-term delivery and/or therapeutic abortion properly fall within the range of reasonably-defined "necessary medical care" for the condition of pregnancy, and that a non-therapeutic (elective) abortion does not do so.

Discussion of the constitutional issue must be prefaced by these observations with respect to the present state of the law as indicated by Supreme Court decisions:

A woman has a constitutional right to terminate her pregnancy during its first two trimesters. *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973).

The Supreme Court did not hold in these cases that a state is under a duty to finance the exercise of the constitutional right to an elective abortion, nor has it ever held that *medical care in general* is a fundamental right,

²⁹ *Id.* 376 F. Supp. at 193.

albeit it has recognized that "medical care is . . . 'a basic necessity of life' to an indigent . . ."³⁰

The Supreme Court has declined to designate welfare in general as a fundamental right,³¹ although it has recognized the critical importance of welfare as providing "the very means by which to live."³²

The cornerstone of the plaintiffs' contention is that the Regulations, *in the absence of a compelling state interest*, violate the Equal Protection Clause in that they discriminatorily divide pregnant eligibles *into two classes*—one which chooses to carry pregnancy to full term delivery, and another which elects to terminate pregnancy for non-therapeutic reasons.

The fallacy of the stated contention is that it disregards the fact that Pennsylvania in its medicaid program has committed itself to extend medical care to its eligibles only where "*necessary medical care*" is required. The only classification made by the Regulations is between necessary medical care and non-necessary medical care. Such a classification does not call into play the "compelling state interest" test. It is subject only to the "reasonable basis", otherwise stated, "rational basis" test, spelled out in *Dandridge v. Williams*, 397 U.S. 471 (1970). There, the Court held that a state regulation which reduced family welfare benefits did not violate the Equal Protection Clause. In doing so it said in relevant part at page 485:

³⁰ *Memorial Hospital v. Maricopa Hospital*, 415 U.S. 250, 259 (1974).

³¹ *See, e.g. Jefferson v. Hackney*, 406 U.S. 535 (1972).

³² *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970).

"In the area of economics and *social welfare*, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. *If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.'* *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78. 'The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific.' *Metropolis Theater Co. v. City of Chicago*, 228 U.S. 61, 69-70." (emphasis supplied).

I am of the opinion that the classification between "necessary medical care" and "non-necessary medical care" survives the application of the "reasonable basis" and/or "rational basis" tests.

It cannot be gainsaid that full-term delivery and/or therapeutic abortions reasonably and rationally fall within the category of "necessary medical care" for a pregnant woman, and that an "elective" or non-therapeutic abortion does not do so.

This, too, must be said:

The holdings of unconstitutionality in the Eighth and Tenth Circuit cases, cited in note 27, rested in large part on the analysis of the three-judge district court in *Klein v. Nassau County Medical Center*³³ in holding that providing

³³ *See* note 27, *supra*. The *Klein* court said:

"The directive, and the State statute, if interpreted as mandating the Commissioner's directive, would deny indigent women the equal protection of the laws to which they are con-

financial assistance to pregnant mothers who carry their babies to full term and delivery while denying financial assistance to mothers who choose instead an "elective" abortion denied the latter mothers the equal protection of the laws guaranteed by the Fourteenth Amendment. That analysis, in only slightly different terms is also advanced before this court by the plaintiffs. The persuasiveness of the analysis depends upon a willingness to accept the posture of the mother as one in which she is required to "resign her freedom of choice" not to bear the fetus term.

There is both a verbal and an emotional appeal about this argument. But the legal and economic fact as well is not precisely stated in it. The compulsion to "resign her freedom of choice" derives not from the state policy but

stitutionally entitled. *They alone are subjected to State coercion to bear children which they do not wish to bear, and no other women similarly situated are so coerced. Other women, able to afford the medical cost of either a justifiable abortifacient or full term child birth, have complete freedom to make the choice in the light of the manifold of considerations directly relevant to the problem uninhibited by any State action. The indigent is advised by the State that the State will deny her medical assistance unless she resigns her freedom of choice and bears the child. She is denied the medical assistance unless she resigns her freedom of choice and bears the child. She is denied the medical assistance that is in general her statutory entitlement, and that is otherwise extended to her even with respect to her pregnancy. She is thus discriminated against both by reason of her poverty and by reason of her behavioral choice. . . .*" 347 F. Supp. at 500. (emphasis supplied.)

It must be noted that the three other district court cases cited in note 27 have also rested their holdings on the reasoning of *Klein*.

from the mother's poverty. The equal protection clause as sought to be used here would require this court to determine that the state, having undertaken to relieve *some* of the burdens of poverty is required to remedy *all* of poverty's burdens. The state, with some support from the medical profession, in reaching a determination of what is medically necessary, and unquestionably with support based on the prevailing mores of the majority of our society, has decided to remedy that problem of poverty which is represented by the costs of medical care during pregnancy and the delivery of the baby. From society's point of view, there are a variety of arguments for the wisdom of such public expenditure, most based upon the desirability of preserving the life and well being of the expectant mother and of assuring healthy babies. The state, thus far, has not concluded that avoidance of unwanted babies is as important as avoidance of unhealthy babies. This may well be an improper determination of values. A court may regard the two objectives as of equal magnitude and conclude that the state is quite wrong. It would be an error, however, for courts to displace the value judgment of the legislature with the value judgment of the court absent a finding that the value judgment of the legislature is proscribed by the Constitution.

There are probably no programs of the state or federal government affording financial assistance that do not contain within them, sometimes unarticulated, norms of conduct that are prerequisite to receiving the assistance. Surely the unavailability of unemployment compensation to one who quits his or her job while affording it to one who has labored to retain it but has been laid off serves as an inducement to refrain from quitting. For the well-off

person in our society, with some independent reserves, that inducement is irrelevant, and the individual is free to quit. For the low-income employee, that policy may well prevent the person from refusing to continue in employment that has become, perhaps, personally unbearable.

The examples could be multiplied. In their determinations of appropriate contexts of financial aid the federal and state legislatures have reflected societal prejudices about human conduct. These differentially affect the poor, who are dependent upon governmental assistance, and the more affluent, who are not. To require the states to forego this kind of policymaking would be to require the states to choose between leaving the pain of poverty unabated or to provide assistance neutral in its assertion of values. Not only would this seem to go well beyond present decisions of the Supreme Court of the United States in interpreting the equal protection clause but it would, if embraced, likely place financial assistance to the poor in many contexts beyond what is politically feasible, thus leaving all the poor worse off than under the present value distinctions made.

Only in the areas in which the poor are faced with governmentally imposed financial burdens—divorce court fees, appeal transcript fees—has the Supreme Court found that legislatures are constitutionally bound to relieve the poor of the burdens of their poverty. The instant case might be such a case, for example, if the Pennsylvania legislature had established a minimum doctor's charge, or even more clearly, a state license fee for an elective abortion. But in the instant case, the burden carried by the indigent mother who desires, an elective abortion has not been made greater by the state. It has simply not been

eased, whereas the state has eased the burden of the costs of pregnancy for the mother who wishes to carry the fetus until term. That kind of distinction in affordance of financial assistance has not till now and should not be subject to judicial supervision under the aegis of the Fourteenth Amendment.

The Equal Protection Clause does not provide cure-all panaceas, or Utopian solution, with respect to all the problems incident to the condition of poverty, e.g. inability of an indigent pregnant woman to privately finance her non-medically necessary (elective) abortion. Otherwise stated, the Equal Protection Clause cannot be construed to afford a guarantee against *all* the incidents of the condition of poverty.

III. THE DISCRIMINATORY ADMINISTRATION OF THE REGULATIONS

As earlier stated, I would enjoin enforcement of the Regulations on the ground that they are being administered in violation of the Equal Protection Clause in that *they are not enforced* against indigents who threaten suit when they are denied funding of an elective abortion, and *they are enforced* against those who do not threaten suit.

It has long been settled that State administrative procedures which are *per se* valid and constitutional may, nevertheless, be enjoined when they are unconstitutionally applied. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). More recently, the Supreme Court has stressed that "a law non-discriminatory on its face may be grossly discrimina-

tory in its operation". *Williams v. Illinois*, 399 U.S. 235, 242 (1970); *Griffin v. Illinois*, 351 U.S. 12 at page 17, n.11 (1956).

The Pennsylvania Department of Justice concedes³⁴ that "it entered into a policy of consenting to the granting of the requested relief [funding of an elective abortion] on an individual basis when . . . litigation was threatened", and it cites in corroboration a Stipulation detailing its policy filed in another action.

In making that concession, the Justice Department urges that "[t]his was *not* a policy of the Pennsylvania Department of Welfare in any way modifying the uniform application of the Pennsylvania Medicaid Regulations. This was, and still is, merely a policy of the lawyers for the defendant in pending litigation . . .".

The fact that Pennsylvania pays for an elective abortion when suit is threatened or pending establishes discriminatory administration of its Regulations. It is *utterly irrelevant* that payment for an elective abortion is made *at the instance of "the lawyers for the defendant"* and *not by way "of the policy of the Department of the Pennsylvania Department of Welfare."*

"The play's the thing."*

The sum total of the existing situation with respect to the Regulations is that they are enforced as to some pregnant indigents seeking elective abortions and denied as to others in the same category.

³⁴ Petition for Reargument of the Pennsylvania Department of Justice.

* Shakespeare, *Hamlet*, II, c.1601.

Standing alone, and independently so, the stated circumstances constitute violation of the Equal Protection Clause of the Fourteenth Amendment.

I would for this reason remand the cause to the court below with directions to enjoin enforcement of the Pennsylvania Regulations in light of their Administration in violation of the Equal Protection Clause of the Fourteenth Amendment.

Judge Gibbons joins in this dissenting opinion except as to Part III.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 74-1726 and 74-1727

Ann Doe; Betty Doe, a minor, by her mother as representative, Mother B. Doe; [Cathy Doe; Donna Doe,] a minor, by her mother as representative, Mother D. Doe; Elaine Doe; Jane Doe, a minor by her father as representative, Father J. Doe; Nancy Doe; Patricia Doe; Ruth Doe; Sylvia Doe; and Toni Doe, each individually and on behalf of all other women similarly situated,

Appellants in No. 74-1727

v.

Frank S. Beal, individually and as Secretary of the Department of Public Welfare, Commonwealth of Pennsylvania; Roger Cutt, individually and as Assistant Deputy Secretary for Medical Services, Commonwealth of Pennsylvania; Glenn Johnson, individually and as Chief of the Bureau of Medical Assistance, Commonwealth of Pennsylvania; James A. Dorsey, Jr., individually and as Executive Director of the Allegheny County Board of Assistance; and the Department of Public Welfare, of the Commonwealth of Pennsylvania,

Appellants in No. 74-1726

(D.C. Civil No. 73-846)

Appeal From the United States District Court
for the Western District of Pennsylvania

Present: Seitz, *Chief Judge* and Kalodner, Van Dusen,
Aldisert, Adams, Gibbons, Rosenn, Hunter and Garth,
Circuit Judges

JUDGMENT ON REHEARING

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued and later reargued en banc by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court filed May 28, 1974, be, and the same is hereby modified to read as follows:

“ . . . IT IS HEREBY ADJUDGED AND DECREED that the Regulations and Procedures of the Department of Public Welfare of the Commonwealth of Pennsylvania, as they apply to reimbursement for abortions performed within the first two trimesters of pregnancy, are invalid because they are inconsistent with Title XIX of the Social Security Act, 42 U.S.C. §1396, *et seq.* In all other respects, Plaintiffs' Request for Declaratory Judgment are denied.”

The cause is hereby remanded to the said District Court so that the three-judge court can be dissolved and the assigned district judge can take any further action required, consistent with the opinion of this Court. Costs taxed against defendant-appellants at No. 74-1726.

ATTEST:

THOMAS P. QUINN
Clerk

July 21, 1975

ADAMS, *Circuit Judge*, dissenting:

I respectfully dissent from the majority. In my judgment, the Pennsylvania regulations are not incompatible with the scheme of medical aid to indigents envisaged by Congress in Title XIX of the Social Security Act. In addition, I do not believe that the Pennsylvania schedule for reimbursements, that includes only medically indicated abortions, violates the Constitution.¹

These conclusions are grounded on reasons set forth in the dissenting opinion of Judge Kalodner here, and that of Judge Weis in the district court, and are based also on the various authorities referred to in those opinions.

¹ It would appear, however, that the Pennsylvania regulation may not be enforced insofar as it predicates eligibility for medical assistance payments on conditions that were specifically invalidated in *Doe v. Bolton*, 410 U.S. 179 (1973), namely, a concurrence of two doctors and performance of the procedure in an accredited hospital.

Supreme Court, U. S.
FILED

AUG 16 1976

MICHAEL RODAK, JR., CLERK

APPENDIX

**In the Supreme Court of the
United States**

October Term, 1976

No. 75-554

FRANK S. BEAL, Individually and as Secretary of the Department of Public Welfare, Commonwealth of Pennsylvania; ROGER CUTT, Individually and as Assistant Deputy Secretary for Medical Services, Commonwealth of Pennsylvania; GLENN JOHNSON, Individually and as Chief of the Bureau of Medical Assistance, Commonwealth of Pennsylvania; JAMES A. DORSEY, JR., Individually and as Executive Director of the Allegheny County Board of Assistance; and the DEPARTMENT OF PUBLIC WELFARE OF THE COMMONWEALTH OF PENNSYLVANIA,

Petitioners

vs.

ANN DOE; BETTY DOE, a Minor, by Her Mother as Representative, MOTHER B. DOE; CATHY DOE; DONNA DOE, a Minor, by Her Mother as Representative, MOTHER D. DOE; ELAINE DOE; JANE DOE, a Minor, by Her Father as Representative, FATHER J. DOE; NANCY DOE; PATRICIA DOE; RUTH DOE; SYLVIA DOE; and TONI DOE, Each Individually and on Behalf of All Other Women Similarly Situated,

Respondents

On Certiorari to the United States Court of Appeals for the Third Circuit.

**PETITION FOR CERTIORARI FILED ON
OCTOBER 10, 1975**

CERTIORARI GRANTED JULY 6, 1976

TABLE OF CONTENTS

	PAGE
Docket Entries	1a
Complaint—Class Action	7a
Temporary Restraining Order	27a
Stipulation of Facts	29a
Affidavit of R. Stanton Wettick, Jr.	30a
Affidavit of Douglass S. Thompson	36a
Affidavit of C. Robert Youngquist	39a
Affidavit of Henry J. Smith	42a
Affidavit of Ruth Doe	44a
Affidavit of Toni Doe	46a
Affidavit of Nancy Doe	48a
Affidavit of Patricia Doe	50a
Affidavit of Cathy Doe	52a
Affidavit of Ann Doe	54a
Affidavit of Betty Doe	56a
Affidavit of Donna Doe	58a
Affidavit of Elaine Doe	60a
Affidavit of Jane Doe	62a
Affidavit of Sylvia Doe	64a
Opinion, District Court	66a
Order, May 3, 1974	106a
Dissenting Opinion, District Court	107a

Supplemental Order, May 28, 1974	115a
Opinion, Court of Appeals, December 10, 1974 ..	117a
Judgment, December 10, 1974	124a
Opinion, Court of Appeals, July 21, 1975	126a
Dissenting Opinion, Court of Appeals	155a
Judgment on Rehearing	184a
Dissenting Opinion, Adams, Circuit Judge	186a

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF PENNSYLVANIA

DOCKET ENTRIES

73-0846

ANN DOE; BETTY DOE, a minor, by her mother as representative, MOTHER B. DOE; [Cathy Doe; Donna Doe], a minor, by her mother as representative, MOTHER D. DOE; ELAINE DOE; JANE DOE, a minor by her father as representative FATHER J. DOE; NANCY DOE; PATRICIA DOE; RUTH DOE; SYLVIA DOE; and TONI DOE, each individually and on behalf of all other women similarly situated

Plaintiffs

vs.

HELENE WOHLGEMUTH, individually and as Secretary of the Department of Public Welfare, Commonwealth of Pennsylvania; ROGER CUTT, individually and as Assistant Deputy Secretary for Medical Services, Commonwealth of Pennsylvania; GLENN JOHNSON, individually and as Chief of the Bureau of Medical Assistance, Commonwealth of Pennsylvania; EDWARD KALBERER, individually and as Executive Director of the Allegheny County Board of Assistance; and the DEPARTMENT OF PUBLIC WELFARE, of the Commonwealth of Pennsylvania

1973

No.

Oct. 3	Complaint filed.	1
Oct. 3	Pltfs' motion for TRO, affidavits in support of motion and proposed order of court.	2

- Oct. 3 Pltfs' motion for 3 Judge Court, Preliminary and Permanent Injunction, and Declaratory Judgment. 3
- Oct. 3 Pltfs' motion for order that this action be maintained as a class action. 4
- Oct. 3 Order ent fixing hearing on Motion for TRO for 10/5/73 (Snyder, J.) 5
- Oct. 3 Summons issued
- Oct. 5 Hearing on Application for TRO begun and concluded (CAV) before Snyder, J. (Non Jury Trial) Hearing memo filed (Rep: M. Mimless) 6
- Oct. 9 Temporary Restraining Order entered directing that pending hearing and determination of pltfs' constitutional claims by a 3 Judge Court, defts, etc. are ordered to pay the reasonable costs of medical services rendered in connection with any abortion performed in Allegheny County by a licensed physician on a woman otherwise eligible for medical assistance during the period between the date of this order and any subsequent action by this Court; this order shall be effective only as to services rendered for abortions performed in Allegheny County and the final determination of the class is referred to the 3 Judge Court; Bond in the sum of \$1.00 will suffice. (Snyder, J.) 7
- Oct. 9 Memorandum filed and Order entered directing that immediate notice be given to Judge Seitz with the request that he convene a 3 judge district court; further ordered that copies of all pleadings together with a copy of this Memorandum and Order and a copy of the Temporary Restraining Order be forwarded to

- Judge Seitz by the Clerk; Judge Sorg is suggested as the 2nd. District Judge who may be appointed to the panel if the Chief Judge decides to convene a 3 judge court. (Snyder, J.) (Copies of all pleadings mailed to Judge Seitz) 8
- Oct. 15 Order of Seitz, J. received and filed designating the Honorable Joseph F. Weis, Jr., & the Honorable Herbert P. Sorg to sit with the Honorable Daniel J. Snyder, Jr. as members of the Court for the hearing and determination of the above captioned matter. 9
- Oct. 18 Order ent fixing hearing for 11/19/73 at 10:00 a.m. before the Statutory Court in Courtroom No. 3; that briefs shall be filed by pltf by 10/29/73 and by deft by 11/8/73. (Snyder, J.) 10
- Oct. 25 Marshal's form 285 returned served 10/17/73 on Edward Kalberer. 11
- Oct. 25 Answer filed by defts. 12
- Oct. 30 Summons returned executed on Roger Cutt 10/24/73; Helene Wohlgemuth 10/24/73; Glenn Johnson 10/24/73. 13
- Nov. 12 Stipulation of Facts filed by parties. 14
- Nov. 15 Motion for leave to proceed in forma pauperis filed by proposed pltf intervenor Joanne Roe. 15
- Nov. 15 Motion for appointment of perserve process filed by proposed pltf intervenor. 16
- Nov. 15 Proposed complaint for Three Judge Court, injunctive relief, and Declaratory relief received from proposed intervenor Joanne Roe. —

- Nov. 15 Motion to intervene as party pltf. and to join additional deft. filed by proposed intervenor Joanne Roe. 17
- Nov. 15 Affidavit, application for TRO received from proposed intervenor Joanne Roe. —
- Nov. 19 Hearing held on Statutory Court. Motion to Intervene, Motion for T.R.O. C.A.V. Memo filed. (Rep. Mimless) (Non Jury Trial) 18
- Nov. 19 Statutory court Order entered denying petition of Joanne Roe to intervene as pty pltf. and to join additional deft; further ordered that apptmt. of person to serve process & petition to proceed in forma pauperis are dismissed without prejudice. (Snyder, J.) (Weis, J.) (Sorg, J.) 19
- Dec. 17 Letter from Louis Kwall to Judge Snyder re: affidavit of Marx Leopold with affidavit of same filed. 20
- Dec. 19 Letter to Court from Louis Kwall in lieu of filing affidavit filed. 21
- 1974
- Feb. 15 Transcript of proceedings of TRO 10/5/73 filed. (Rep. Mimless) 22
- May 3 Opinion filed and Order entered directing that this court declines to certify the Plaintiffs as representative of a class for the reasons stated in accompanying opinion & inasmuch as the requests of Original Temporary Restraining Order have been fulfilled, it is not necessary to take any further action with respect thereto; & any further action by this Court will

- be held in abeyance pending specific requests pursuant to this opinion (Judges Snyder, Sorg.) 23
- May 3 Dissenting Opinion filed. (Weis, J.) 24
- May 3 Pursuant to opinions filed and Order entered this case is hereby marked closed. Bernhard Schoeffler, Clerk
- May 6 Notices mailed.
- May 6 Copies of opinions mailed to all circuit judges.
- May 21 Affidavit of C. Robert Youngquist filed. 25
- May 28 Supplemental Order entered that the Regulations and Procedures of the Department of Public Welfare of the Commonwealth of Penna, as they apply to reimbursement for abortions performed within the first twelve (12) weeks of pregnancy, are unconstitutional. In all other respects, Pltfs' Requests for Declaratory Judgment are denied. Further ordered that the Pltfs' Requests for Injunctive Relief are denied. (Snyder, J.) (Sorg, J.) 26
- May 28 Copy of Supplemental order mailed to all circuit judges.
- May 31 Motion for leave to proceed on appeal in forma pauperis and proposed order [illegible]. 27
- May 31 Notice of Appeal received.
- May 31 Order entered directing that Motion to proceed on appeal in forma pauperis be granted. (Snyder, J.) w/27
- May 31 Notice of Appeals filed, by plaintiff. 28

- June 3 Copy of notice mailed to U.S. Supreme Court; copy of notice mailed to appellees; copy of notice to all Judges; letters to all counsel of record.
- June 10 Copy of notice of Appeal mailed to U.S. Court of Appeals.
- June 11 Defts' motion to alter or amend final judgment pursuant to F.R.C.P. 59(c) filed. 29
- June 11 Defts' motion to withdraw defts' motion to alter or amend final judgment pursuant to F.R.C.P. 59(c) filed with proposed order attached. 30
- June 17 Order entered permitting defts. to withdraw their motion to alter or amend final judgment (Snyder, J.) (order ented, on motion filed 6/11/74). —
- June 19 Notice of appeal filed by defendants. 31
- June 19 Copy of notice mailed to Ct. of Appeals; copy of notice to appellees; copy of notice to all Judges; letters to all counsel of record.
- June 24 Amended Notice of appeal filed by pltf. 32
- June 24 Copy of amended notice mailed U.S. Ct. of Appeals, counsel for defts; copy of notice to Judge Snyder, Sorg and Weis; letters to counsel.
- June 25 Original record mailed to U.S. Ct. of Appeals.

[Title omitted in printing.]

COMPLAINT—CLASS ACTION

I. Introductory Statement

1. The Pennsylvania Medical Assistance Program does not provide reimbursement for abortions unless documented medical evidence is submitted by the performing physician and two other physicians that continuance of the pregnancy may threaten the health or life of the mother, that the infant may be born with incapacitating physical deformity or medical deficiency or that the pregnancy results from legally established statutory or forcible rape or incest and its continuance may constitute a threat to the mental or physical health of the patient. In this action plaintiffs, indigent pregnant women on Medical Assistance who lack the funds to obtain the abortions which they presently seek, request this Court to declare these restrictions on the types of abortions covered by Pennsylvania's Medical Assistance Program illegal and to enjoin Commonwealth officials (defendants) from refusing to pay the reasonable costs of any abortion provided by a licensed physician to women eligible for Medical Assistance. Plaintiffs base their claim for relief primarily upon the constitutional right to privacy recognized in *Roe v. Wade*, 410 U.S. 113 (1973) as "broad enough to encompass a woman's decision whether or not to terminate her pregnancy"; upon the equal protection clause of the Fourteenth Amendment which prohibits arbitrary classifications; and upon Title XIX of the Social Security Act which requires reimbursement of physicians' services.

II. Jurisdiction

2. This Court has jurisdiction of this cause under 28 U.S.C. §§1343(3) and (4) which authorize federal courts to enforce rights, privileges and immunities derived from 42 U.S.C. §1983 and secured by the Constitution of the United States.

3. This Court also has jurisdiction of this cause under 28 U.S.C. §1331. The amount in controversy exceeds ten thousand dollars in value, exclusive of interest and costs.

4. Monetary damages are inadequate; thus, injunctive relief is necessary.

5. Plaintiffs also seek a declaratory judgment pursuant to 28 U.S.C. §§2201 and 2202 and Rule 57, Federal Rules of Civil Procedure, relating to declaratory judgments.

III. Three-Judge Court

6. Plaintiffs request that a three-judge court be convened pursuant to 28 U.S.C. §§2281 and 2284, because they seek to restrain the enforcement of regulations and procedures of the Pennsylvania Department of Public Welfare which have statewide application. The regulations and procedures are attacked on the grounds that they contravene the First, Fourth, Ninth and Fourteenth Amendments to the United States Constitution.

IV. Plaintiffs

7. Plaintiffs are:

Ann Doe, Betty Doe, Cathy Doe, Donna Doe, Elaine Doe, Jane Doe, Nancy Doe, Patricia Doe, Ruth Doe, Sylvia Doe, and Toni Doe.

8. All plaintiffs are citizens of the United States and all plaintiffs reside in Pittsburgh, Allegheny County, Pennsylvania, with the exception of Donna Doe who is a resident of Braddock, Allegheny County, Pennsylvania and Cathy Doe who is a resident of Apollo, Armstrong County, Pennsylvania.

9. All plaintiffs are females of child-bearing age.

10. All plaintiffs have been certified by the Department of Public Welfare as eligible for the Pennsylvania Medical Assistance Program.

11. All plaintiffs are using names adopted solely for purposes of this lawsuit to maintain anonymity.

V. Class Action Allegations

12. Plaintiffs bring this action on behalf of themselves and all others similarly situated pursuant to Rule 23(b)(2), Federal Rules of Civil Procedure. The members of the class similarly situated are all females of child-bearing age who are or in the future will be eligible for benefits under the Pennsylvania Medical Assistance Program administered by defendants. This class includes thousands of individuals.

13. This is a proper class action because persons in the class are so numerous that joinder of all members is impractical; the questions of law or fact are common to the class; the claims of the representative parties are typical of the claims of the class; and the representative parties will fairly and adequately protect the interests of the class.

14. Plaintiffs are adequate representatives of the class because their interests are identical to the interests of the other members of the class.

15. The question of law common to the class is whether Department of Public Welfare procedures which deny Medical Assistance coverage for abortion services provided to certain females of child-bearing age eligible for Medical Assistance, violate the First, Fourth, Ninth and Fourteenth Amendment rights and Title XIX rights of these females.

VI. Defendants

16. Defendants are:

(a) Department of Public Welfare of the Commonwealth of Pennsylvania, which administers the Pennsylvania Medical Assistance Program;

(b) Helene Wohlgemuth, Secretary of the Department of Public Welfare of the Commonwealth of Pennsylvania, who is the chief administrative officer of the Department of Public Welfare;

(c) Roger Cutt, Assistant Deputy Secretary for Medical Services, who directly administers the Medical Assistance Program of Pennsylvania;

(d) Glenn Johnson, Chief of the Bureau of Medical Assistance, whose administrative responsibilities for the Medical Assistance Program of Pennsylvania include the supervision of the review of claims for Medical Assistance payments; and

(e) Edward Kalberer, Executive Director of the Allegheny County Board of Assistance, who administers the Medical Assistance Program in Allegheny County.

VII. Statement of Claim

17. Pennsylvania participates in the federal-state program of Medical Assistance for the poor and the near-

poor, governed by Title XIX of the Social Security Act. This Act requires that the State provide Medical Assistance to all those deemed eligible (42 U.S.C. §1936(a)-(10)). Medical Assistance is defined to include "medical care, or any other type of remedial care recognized under State law, furnished by licensed practitioners within the scope of their practice as defined by State law" (42 U.S.C. §1396d(a)(6)) and "physicians' services, whether furnished in the office, the patient's home, a hospital, or a skilled nursing home or elsewhere . . ." 42 U.S.C. 1396d(a)(5).

18. Regulations and Procedures of the Department of Public Welfare provide that abortions of Medical Assistance recipients are covered by the Pennsylvania Medical Assistance Program only in the following circumstances:

1. There is documented medical evidence that continuance of the pregnancy may threaten the health or life of the mother;

2. There is documented medical evidence that the infant may be born with incapacitating physical deformity or mental deficiency;

3. There is documented medical evidence that a continuance of a pregnancy resulting from legally established statutory or forcible rape or incest, may constitute a threat to the mental or physical health of a patient;

4. Two other physicians chosen because of their recognized professional competence have examined the patient and have concurred in writing; and

5. The procedure is performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals.

19. These procedures of the Department of Public Welfare which restrict the types of abortions covered by the Pennsylvania Medical Assistance Program are not required by any state statute or federal statute or regulation.

A. Elaine Doe

20. Plaintiff Elaine Doe is an unmarried mother of two children and relies totally on a two hundred fifty dollar per month Public Assistance grant for the maintenance of her family. Plaintiff Elaine Doe desires to terminate her pregnancy because it has caused her emotional difficulty and she believes her family cannot bear the added financial burden. She has already had to drop out of school because of her pregnancy. Plaintiff does not seek to terminate her pregnancy for any of the reasons established under Department of Public Welfare regulations and does not have the resources to pay for an abortion.

B. Donna Doe

21. Plaintiff Donna Doe, a minor, brings this claim by her mother as representative, Mother D. Doe. Plaintiff, a high school student, resides with her mother in Braddock, Pennsylvania, and together they receive approximately thirty-four dollars every two weeks from the Welfare Department in addition to a small pension. The minor with her mother's agreement desires to terminate her pregnancy because of emotional difficulties resulting from her peer group and the desire not to have her long range educational plans interrupted. Plaintiff believes the long-

er the delay in terminating her pregnancy, the greater the ridicule from her peers will become. Since plaintiff is without funds to pay for an abortion or the services of consulting physicians and since her reasons for wanting the abortion are not consistent with standards of the Department of Public Welfare, she looks to this Court for relief.

C. Cathy Doe

22. Plaintiff Cathy Doe is a divorced mother of four children residing with her children in Apollo, Pennsylvania in Armstrong County. While three of plaintiff's children receive support from their father, plaintiff and one child rely on an Aid to Dependent Children welfare grant of one hundred twenty dollars per month. Plaintiff not only decided on her own for financial reasons to terminate her pregnancy, but was also advised by her doctor to terminate the pregnancy. Since plaintiff has no extra resources for situations such as this, she is in need of immediate relief from the State policy preventing her from receiving an abortion.

D. Betty Doe

23. Plaintiff Betty Doe, an unmarried pregnant minor, brings this suit by a representative, her mother, Mother B. Doe. Plaintiff is a member of a six person fatherless family which receives one hundred eighty-two dollars every two weeks from the Department of Public Welfare. Plaintiff, with her mother's concurrence, desires to terminate her pregnancy because of her youth and because she believes the birth out of wedlock will bring discredit to her family. Plaintiff's reasons for wanting an abortion do not correspond with any of the reasons established under Pennsylvania's Medical Assistance Program for re-

imbursement, and plaintiff is without her own funds to pay for abortion services.

E. Jane Doe

24. Plaintiff Jane Doe, an unwed pregnant minor, is one of three children living with her grandmother, and brings this suit by a representative, her father, Father J. Doe. Plaintiff attends public high school and relies on the Welfare Department as her primary source of income. Plaintiff and her father agree that it would be unwise for a woman of her age to give birth not only because of the emotional stress involved, but that it would detrimentally affect her long range plans. Plaintiff's desire for an abortion is not founded on any of the reasons set forth in Medical Assistance policy for having the services reimbursed and plaintiff is without funds to secure the services on her own.

F. Ann Doe

25. Plaintiff Ann Doe is the divorced mother of two children and receives one hundred three dollars every two weeks from Public Assistance. Plaintiff has other medical difficulties in the form of internal infections. In light of these other medical problems as well as personal reasons, plaintiff has elected to terminate her pregnancy. Plaintiff's emotional state has suffered severely as a result of her present pregnancy. Plaintiff's poverty and the Commonwealth's policy on abortions prevent her from receiving this medical service.

G. Nancy Doe

26. Plaintiff Nancy Doe lives in the Hill District section of the City of Pittsburgh with her five children, aged 10, 9, 8, 2 and 1. Nancy Doe's sole source of income

is an A.F.D.C. Public Assistance grant received every other week. Nancy Doe is pregnant and has made the decision not to carry her pregnancy through to birth because of the burden and interruption to her personal life the birth would cause. Nancy Doe does not seek to terminate her pregnancy for any of the purposes contained in the Department of Public Welfare procedures governing Medical Assistance coverage of abortions. Nancy Doe spends her entire Public Assistance grant on food, shelter and other absolute necessities of life. She has no money, savings or other assets with which to pay for an abortion or an examination by three doctors pursuant to the procedures governing Medical Assistance coverage of abortions.

H. Patricia Doe

27. Plaintiff Patricia Doe lives by herself in the Hazelwood section of the City of Pittsburgh. Plaintiff's sole source of income is a general assistance grant received semi-monthly from the Department of Public Welfare. Patricia Doe's public assistance grant does not allow for medical expenses and Pennsylvania's Medical Assistance Program does not cover abortion services when needed under the circumstances of Patricia Doe.

I. Ruth Doe

28. Plaintiff Ruth Doe lives in the Southside section of the City of Pittsburgh with her four and one-half month old child. Ruth Doe is recently separated from her husband and relies primarily on public assistance for her maintenance. Ruth Doe is pregnant and has made the decision not to carry her pregnancy through to birth because of the burden and interruption to her personal life the birth would cause. Ruth Doe has been advised by a doctor and believes that continuance of her pregnancy

threatens her health and life because the pregnancy occurred within approximately 10 weeks of the birth of her last child. Ruth Doe also believes that if the pregnancy continues, the infant may be born with an incapacitating physical deformity or mental deficiency because her husband was a drug addict at the time of pregnancy. Ruth Doe is without the necessary funds to obtain abortion services. Ruth Doe spends her entire Public Assistance grant on food, shelter and other absolute necessities of life. She has no money, savings or other assets with which to pay for an abortion or an examination by three doctors pursuant to the procedures governing Medical Assistance coverage of abortions.

J. Sylvia Doe

29. Sylvia Doe lives in the Point Breeze section of the City of Pittsburgh with her husband and two children, aged 5 and 2. Sylvia Doe's sole source of income is a Public Assistance grant received every two weeks. Sylvia Doe believes that continuance of her pregnancy threatens her health because she has had medical problems with her stomach in the recent past and also is highly nervous. Plaintiff is without funds due to her limited income to pay for the abortion herself or to pay for the doctors necessary to bring her under the standards for reimbursement of abortion service established by the Department of Public Welfare.

K. Toni Doe

30. Plaintiff Toni Doe lives in the Northside section of Pittsburgh with her mother and children, ages 4, 2 and 1. Plaintiff relies totally on Public Assistance for her daily maintenance as well as for medical expenses. Plaintiff desires medical services to terminate her present

pregnancy, but because her reasons for wanting the termination are not among those listed by the Department of Public Welfare as those for which reimbursement can be made, she has not been able to obtain an abortion. Nor does Toni Doe have any other source of funds which could be used for an abortion.

31. On October 1, 1973, each of the named plaintiffs, being pregnant and choosing to terminate the pregnancy by abortion, requested an abortion from Magee-Womens Hospital and had her request for abortion services denied.

32. Magee-Womens Hospital followed the same procedures for each of the named plaintiffs:

(a) The hospital advised each plaintiff that it would not provide the abortion unless it was paid for in advance or unless the plaintiff submitted the documented evidence, including written reports of three doctors, necessary for the abortion to be covered by the Pennsylvania Medical Assistance Program;

(b) The hospital also advised each of the plaintiffs that it had no procedures for providing the doctors for the examinations which are required for abortions to be covered by Medical Assistance; and

(c) If plaintiffs inquired as to how they might obtain the examinations by three doctors necessary for Medical Assistance coverage, the hospital advised plaintiffs that this was not a realistic possibility because the expenses involved in obtaining these examinations would be almost as great as the cost of the abortion. Therefore if a patient cannot afford

an abortion, the patient won't be able to afford the medical examinations necessary for Medical Assistance coverage.

33. Magee-Womens Hospital refused to provide abortion services to each of the named plaintiffs solely because named plaintiffs cannot afford to pay for the abortions and cannot meet the requirements for Medical Assistance coverage of abortions.

34. Magee-Womens Hospital will provide abortion services to each of the named plaintiffs if such services are covered by Medical Assistance.

35. Each of the named plaintiffs cannot afford to pay for an abortion and cannot secure the documented evidence from three doctors necessary for Medical Assistance coverage.

36. Also the requirements for Medical Assistance coverage of an examination of the patient by three doctors is a medically useless, burdensome requirement which causes unnecessary delay and interferes with the right of privacy of the patient.

37. Because each of the named plaintiffs is prevented from terminating her pregnancy through abortion as a result of the Medical Assistance restrictions on abortion coverage, she suffers immediate, grave and irreparable harm to her health and well-being.

38. The restrictions of the Medical Assistance Program on the coverage of abortions are unconstitutional and illegal for the following reasons:

(a) Defendants' policies have created two classes within the group of women eligible for Med-

ical Assistance: women who are eligible for Medical Assistance benefits in connection with their pregnancy because they choose to carry the pregnancy to birth and women who are ineligible for Medical Assistance benefits in connection with their pregnancy because they choose to terminate the pregnancy through an abortion performed by a physician. This distinction between women who choose to carry their pregnancy to birth and women who choose to terminate their pregnancy through an abortion performed by a physician promotes no valid State interest and thus deprives plaintiffs of their rights to equal protection guaranteed by the Fourteenth Amendment to the United States Constitution;

(b) Defendants' policies also have created two other classes within the group of women eligible for Medical Assistance: women whose abortions meet the criteria for Medical Assistance coverage of abortions and women whose abortions do not meet this criteria. This distinction between these classes of women promotes no valid State interest and thus deprives plaintiffs of their rights to equal protection guaranteed by the Fourteenth Amendment to the United States Constitution;

(c) Defendants' policies also violate Fourteenth Amendment equal protection rights of plaintiffs and all other females of child-bearing age by arbitrarily singling out for exclusion from Medical Assistance coverage medical care and physicians' services which only females need;

(d) By paying reasonable medical expenses in connection with a pregnancy if a woman elects to

carry a pregnancy to birth but not if she elects to terminate the pregnancy prior to birth with an "elective" abortion, defendants' procedures interfere with a woman's right to decide whether to terminate her pregnancy in violation of the First, Fourth, Ninth, and Fourteenth Amendments to the Constitution; and

(f) By conditioning eligibility for Medical Assistance benefits for abortions on the requirement that a woman consult with two physicians in addition to her performing physician, defendants' procedures violate the rights to privacy and liberty of plaintiffs and the members of the class in violation of the First, Fourth, Ninth and Fourteenth Amendments to the Constitution.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs, on behalf of themselves and all other members of the class, respectfully pray that:

1. This Court convene a Three-Judge District Court as required by 28 U.S.C. §§2281 and 2284.
2. This Court issue an order pursuant to Rule 23-(c) (1) permitting this action to be maintained as a class action.
3. The Court immediately grant a temporary restraining order pursuant to Rule 65 (b), Federal Rules of Civil Procedure, restraining defendants from refusing to pay the reasonable costs of abortion services prescribed by a licensed physician and provided to women eligible for Medical Assistance.
4. This Court preliminarily and permanently enjoin defendants from refusing to pay the reasonable costs

of abortion services prescribed by a qualified physician and provided to women eligible for Medical Assistance.

5. This Court enter a final judgment pursuant to 28 U.S.C. §§2201 and 2202 declaring defendants' policy and practice of refusing to pay the reasonable costs of abortion services provided by a licensed physician to women eligible for Medical Assistance invalid in violation of the First, Fourth, Ninth and Fourteenth Amendments to the Constitution and the provisions of Article XIX of the Social Security Act.

6. This Court allow plaintiffs their costs and grant them and all others similarly situated such additional and alternative relief, including payment of all monies wrongfully withheld, as the Court may deem to be just and appropriate.

(s) R. Stanton Wettick, Jr.
R. Stanton Wettick, Jr.

(s) Judd F. Crosby
Judd F. Crosby

Attorneys for Plaintiffs
310 Plaza Building
535 Fifth Avenue
Pittsburgh, Pennsylvania 15219
(412) 281-1662

Commonwealth of Pennsylvania,
County of Allegheny, ss:

VERIFICATION

Before me, the undersigned authority, a Notary Public in and for the said Commonwealth and County, personally appeared ANN DOE, who being duly sworn ac-

according to law deposes and says that the averments in the foregoing Complaint are true and correct to the best of her knowledge, information and belief.

(s) Ann Doe
Ann Doe

[Jurat omitted in printing.]

Commonwealth of Pennsylvania,
County of Allegheny, ss:

VERIFICATION

Before me, the undersigned authority, a Notary Public in and for the said Commonwealth and County, personally appeared BETTY DOE, who being duly sworn according to law deposes and says that the averments in the foregoing Complaint are true and correct to the best of her knowledge, information and belief.

(s) Betty Doe
Betty Doe

[Jurat omitted in printing.]

Commonwealth of Pennsylvania,
County of Allegheny, ss:

VERIFICATION

Before me, the undersigned authority, a Notary Public in and for the said Commonwealth and County, personally appeared Cathy Doe who being duly sworn according to law deposes and says that the averments in the

foregoing Complaint are true and correct to the best of her knowledge, information and belief.

(s) Cathy Doe
Cathy Doe

[Jurat omitted in printing.]

Commonwealth of Pennsylvania,
County of Allegheny, ss:

VERIFICATION

Before me, the undersigned authority, a Notary Public in and for the said Commonwealth and County, personally appeared DONNA DOE, who being duly sworn according to law deposes and says that the averments in the foregoing Complaint are true and correct to the best of her knowledge, information and belief.

(s) Donna Doe
Donna Doe

[Jurat omitted in printing.]

Commonwealth of Pennsylvania,
County of Allegheny, ss:

VERIFICATION

Before me, the undersigned authority, a Notary Public in and for the said Commonwealth and County, personally appeared ELAINE DOE, who being duly sworn according to law deposes and says that the averments in the foregoing Complaint are true and correct to the best of her knowledge, information and belief.

(s) Elaine Doe
Elaine Doe

[Jurat omitted in printing.]

Commonwealth of Pennsylvania,
County of Allegheny, ss:

VERIFICATION

Before me, the undersigned authority, a Notary Public in and for said Commonwealth and County, personally appeared JANE DOE, who being duly sworn according to law deposes and says that the averments in the foregoing Complaint are true and correct to the best of her knowledge, information and belief.

(s) Jane Doe
 Jane Doe

[Jurat omitted in printing.]

Commonwealth of Pennsylvania,
County of Allegheny, ss:

VERIFICATION

Before me, the undersigned authority, a Notary Public in and for the said Commonwealth and County, personally appeared Nancy Doe, who being duly sworn according to law deposes and says that the averments in the foregoing Complaint are true and correct to the best of her knowledge, information and belief.

(s) Nancy Doe
 [Jurat omitted in printing.]

Commonwealth of Pennsylvania,
County of Allegheny, ss:

VERIFICATION

Before me, the undersigned authority, a Notary Public in and for the said Commonwealth and County, per-

sonally appeared PATRICIA DOE who being duly sworn according to law deposes and says that the averments in the foregoing Complaint are true and correct to the best of her knowledge, information and belief.

(s) Patricia Doe

[Jurat omitted in printing.]

Commonwealth of Pennsylvania,
County of Allegheny, ss:

VERIFICATION

Before me, the undersigned authority, a Notary Public in and for the said Commonwealth and County, personally appeared RUTH DOE who being duly sworn according to law deposes and says that the averments in the foregoing Complaint are true and correct to the best of her knowledge, information and belief.

(s) Ruth Doe

[Jurat omitted in printing.]

Commonwealth of Pennsylvania,
County of Allegheny, ss:

VERIFICATION

Before me, the undersigned authority, a Notary Public in and for the said Commonwealth and County, personally appeared SYLVIA DOE who being duly sworn according to law deposes and says that the averments in the foregoing Complaint are true and correct to the best of her knowledge, information and belief.

(s) Sylvia Doe

[Jurat omitted in printing.]

Commonwealth of Pennsylvania,
County of Allegheny, ss:

VERIFICATION

Before me, the undersigned authority, a Notary Public in and for the said Commonwealth and County, personally appeared TONI DOE who being duly sworn according to law deposes and says that the averments in the foregoing Complaint are true and correct to the best of her knowledge, information and belief.

(s) Tony Doe

[Jurat omitted in printing.]

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF PENNSYLVANIA

[Caption Omitted]

TEMPORARY RESTRAINING ORDER

Plaintiffs having moved this Court pursuant to 28 U.S.C. 2284 (3) for a temporary restraining order, restraining defendants Helene Wohlgemuth, Roger Cutt, Glenn Johnson, Edward Kalberer, and the Department of Public Welfare of the Commonwealth of Pennsylvania from denying reimbursement payments for the reasonable costs of abortion services when provided by licensed practitioner or institution in Allegheny County, Pennsylvania, to women eligible for medical services under the Commonwealth of Pennsylvania Medical Assistance Program, except for certain requirements as more particularly set forth in the Complaint; and upon consideration of the pleadings, affidavits, memoranda submitted on behalf of the parties, and after hearing; and upon the findings by this Court that a substantial question has been raised as to the constitutional validity of the challenged procedures which deny reimbursement except under the terms and conditions as set forth in the Complaint, and that the plaintiffs are seeking as a class a temporary restraining order only as to abortions requested in Allegheny County, and that such plaintiffs in said Allegheny County are now and will continue to suffer irreparable harm as a result of defendants' poli-

cies which prevent them from obtaining the abortions which they seek,

IT IS ORDERED AND DECREED that:

1. Pending hearing and determination of plaintiffs' constitutional claims by a Three Judge Court, defendants, their successors in office, agents and employees and all other persons in active concert with them, are ordered to pay the reasonable costs of medical services rendered in connection with any abortion performed in Allegheny County by a licensed physician on a woman otherwise eligible for medical assistance during the period between the date of this order and any subsequent action by this Court.

2. This order shall be effective only as to services rendered for abortions performed in Allegheny County and the final determination of the class is referred to the Three Judge Court.

3. Under the circumstances, Bond in the sum of \$1.00 will suffice.

David J. Snyder, J.,
United States District Judge

Entered at Pittsburgh, Pennsylvania this 9th day of October, 1973 at 1:30 o'clock, P.M.

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF PENNSYLVANIA

[Caption Omitted]

STIPULATION OF FACTS

The parties to this action hereby stipulate (a) that plaintiffs were prepared to introduce testimony from credible witnesses to support the allegations of fact contained in the attached affidavits of R. Stanton Wettick, Jr.; Douglass S. Thompson; C. Robert Youngquist; Henry J. Smith; and each of the named plaintiffs; and (b) that for purposes of this case the allegations of fact contained in the attached affidavits, as altered by agreement of counsel, shall be accepted as true and correct.

R. Stanton Wettick, Jr.
Attorney for Plaintiffs
Louis Kwall
Attorney for Defendants

Dated November 10, 1973

*Commonwealth of Pennsylvania,
County of Allegheny, ss:*

AFFIDAVIT OF R. STANTON WETTICK, JR.

R. Stanton Wettick, Jr., being duly sworn, deposes and says that to the best of my knowledge the following facts are true and correct and can be proven through competent credible testimony:

1. The eleven named plaintiffs in this action are citizens of the United States. Each plaintiff resides in Pittsburgh, Allegheny County, Pennsylvania with the exception of Donna Doe, who is a resident of Braddock, Allegheny County, Pennsylvania and Cathy Doe, who is a resident of Apollo, Armstrong County, Pennsylvania.

2. Plaintiffs are real persons who are using fictitious names adopted solely for purposes of this lawsuit to maintain anonymity.

3. Defendants are:

(a) Department of Public Welfare of the Commonwealth of Pennsylvania, which administers the Pennsylvania Medical Assistance Program;

(b) Helene Wohlgemuth, Secretary of the Department of Public Welfare of the Commonwealth of Pennsylvania, who is the chief administrative officer of the Department of Public Welfare;

(c) Roger Cutt, Assistant Deputy Secretary for Medical Services, who directly administers the Medical Assistance Program of Pennsylvania;

(d) Glenn Johnson, Chief of the Bureau of Medical Assistance, whose administrative responsibilities for the Medical Assistance Program of Pennsylvania include the supervision of the review of claims for Medical Assistance payments; and

(e) Edward Kalberer, Executive Director of the Allegheny County Board of Medical Assistance, who administers the Medical Assistance Program in Allegheny County.

4. From on or before September 1973 to the present date, named plaintiffs have been certified by the Pennsylvania Department of Public Welfare as eligible for the Pennsylvania Medical Assistance Program.

5. As of October 1, 1973, each of the named plaintiffs was pregnant. Their length of pregnancy ranged from six weeks to seventeen weeks.

6. Each of the named plaintiffs desired to terminate her pregnancy by an abortion.

7. Certain of the named plaintiffs would testify that they sought to terminate their pregnancies because the continuance of their pregnancy threatened their health. Other named plaintiffs would testify that they sought to terminate their pregnancies for other reasons unrelated to the protection of health or life.

8. The primary source of income of each of the named plaintiffs is a public assistance grant from the Department of Public Welfare.

9. Each of the named plaintiffs had no money, savings or other assets with which to pay for the abortion which she sought or for the examinations by outside physi-

cians which are required for an abortion to be covered by Medical Assistance.

10. Procedures of the Pennsylvania Department of Public Welfare provide that abortions of Medical Assistance recipients are covered by the Pennsylvania Medical Assistance Program in the following circumstances:

a. There is documented medical evidence that continuance of a pregnancy may threaten the health or life of the mother;

b. There is documented medical evidence that the infant may be born with incapacitating physical deformity or mental deficiency; or

c. There is documented medical evidence that a continuance of a pregnancy resulting from a legally established statutory or forcible rape or incest, may constitute a threat to the mental or physical health of a patient;

d. Two other physicians chosen because of their recognized professional competency have examined the patient and have concurred in writing; and

e. The procedure is performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals.

11. None of the named plaintiffs was able to meet all of the requirements of the above Department of Public Welfare procedures for Medical Assistance coverage of abortions. Certain of the named plaintiffs could have met these requirements if Magee-Womens Hospital had made physicians available to them to provide the necessary documented medical evidence establishing that continuance of

the pregnancy may threaten the health of the mother. For other named plaintiffs, however, continuance of the pregnancy did not threaten the health or life of the mother, there was no cause to believe that the infant may be born with incapacitating physical deformity or mental deficiency and the pregnancy did not result from statutory or forcible rape or incest.

12. Prior to the issuance of the Temporary Restraining Order in this case on October 9, 1973, the named plaintiffs attempted to and were unable to obtain the abortions which they sought.

13. On October 1, 1973, each of the named plaintiffs requested an abortion from Magee-Womens Hospital and had her request for an abortion refused.

14. Magee-Womens Hospital followed the same procedures for each of the named plaintiffs:

a. The hospital advised each plaintiff that it would not provide the abortion unless the abortion was paid for in advance or unless plaintiff submitted the documented evidence, including written reports of three doctors, necessary for the abortion to be covered by the Pennsylvania Medical Assistance Program;

b. The hospital also advised each of the plaintiffs that it had no procedures for providing the doctors for the examinations which are required for abortions to be covered by Medical Assistance; and

c. If plaintiffs inquired as to how they might obtain the examinations by three doctors necessary for Medical Assistance coverage, the hospital advised plaintiffs that this was not a realistic possibility be-

cause the expenses involved in obtaining these examinations would be almost as great as the cost of the abortion.

15. Magee-Womens Hospital refused to provide abortions to each of the named plaintiffs. The reason given by Magee-Womens Hospital to each plaintiff for refusing to provide the abortion was that she could not afford to pay for the abortion and could not meet the requirements for Medical Assistance coverage of abortions. Magee-Womens Hospital would have provided the abortions to each of the named plaintiffs if the abortions had been covered by Medical Assistance.

16. After the issuance of the Temporary Restraining Order on October 9, 1973, ordering defendants to pay the reasonable costs of medical services rendered in connection with any abortion performed in Allegheny County by a licensed physician on a woman otherwise eligible for Medical Assistance, most—if not all—named plaintiffs returned to Magee-Womens Hospital and received an abortion.

17. As of September 1973, over 60,000 families containing over 125,000 residents of Allegheny County were certified as eligible for Medical Assistance by the Department of Public Welfare. Thousands of these persons are females between the ages of 15 and 35.

18. As of September 1973, over eight hundred thousand residents of the Commonwealth of Pennsylvania were certified as eligible for Medical Assistance by the Department of Public Welfare. Thousands of these persons are females between the ages of 15 and 35.

R. Stanton Wettick, Jr.
R. Stanton Wettick, Jr.

Sworn to and subscribed before me this 9th day of November, 1973.

Mary Eileen Jennings,
Notary Public
Pittsburgh, Allegheny County

Commission expires May 22, 1973
Member, Pennsylvania Association of Notaries

*Commonwealth of Pennsylvania,
County of Allegheny, ss:*

AFFIDAVIT OF DOUGLASS S. THOMPSON

DOUGLASS S. THOMPSON, being duly sworn, deposes and says:

1. I am an Associate Professor of Obstetrics and Gynecology at the University of Pittsburgh School of Medicine, Director of the Division of Community Health at Magee-Womens Hospital, and Medical Director, Ob-Gyn Medical Care Center of Magee-Womens Hospital.

2. It is the practice of all physicians associated with Magee-Womens Hospital to schedule abortions within the first eleven weeks of pregnancy if possible. Procedures used for these abortions involve a significantly lower risk of morbidity and mortality than do the procedures which must be used when abortions are done at any later stages of a pregnancy.

3. Magee-Womens Hospital will not provide abortions to women who are more than twenty weeks pregnant without special permission for extremely unusual cases.

Douglass S. Thompson
Douglass S. Thompson

Sworn to and subscribed before me this 3rd day of October, 1973.

Margaret M. Guzik,
Notary Public
Pittsburgh, Allegheny County

My Commission expires Sept. 4, 1976
Member, Pennsylvania Association of Notaries

*Commonwealth of Pennsylvania,
County of Allegheny, ss:*

AFFIDAVIT OF DOUGLASS S. THOMPSON

Douglass S. Thompson, being duly sworn, deposes and says:

1. I am an Associate Professor of Obstetrics and Gynecology at the University of Pittsburgh School of Medicine, Director of the Division of Community Health at Magee-Womens Hospital, and Medical Director, Ob-Gyn Medical Care Center of Magee-Womens Hospital.

2. Magee-Womens Hospital is reimbursed by the Pennsylvania Department of Public Welfare for family planning services provided to Medical Assistance recipients.

3. Each month Magee-Womens Hospital provides family planning services to more than 350 Medical Assistance recipients and is reimbursed by the Department of Public Welfare for these services.

4. The family planning services provided to the Medical Assistance recipients for which Magee-Womens Hospital is reimbursed by the Department of Public Welfare include prescription of oral contraceptives; insertion of intra uterine devices; fitting and prescribing diaphragms; recommendation of contraceptive foams and condoms; and instructions regarding the rhythm method of family planning.

5. These family planning services are provided to any female or male Medical Assistance recipient who requests them, including Medical Assistance recipients who are unmarried. Medical Assistance's only restriction is that minors require parental consent.

6. Also pharmacists who fill prescriptions written by Magee-Womens Hospital for oral contraceptives for Medical Assistance recipients are reimbursed by the Department of Public Welfare regardless of whether the recipient is married or unmarried.

Douglass S. Thompson

Sworn to and subscribed before me this — day of November, 1973.

Notary Public

*Commonwealth of Pennsylvania,
County of Allegheny, ss:*

AFFIDAVIT OF C. ROBERT YOUNGQUIST

C. ROBERT YOUNGQUIST, being duly sworn, deposes and says:

1. I am C. Robert Youngquist, Executive Director of Magee-Womens Hospital.
2. Magee-Womens Hospital is a non-profit hospital located at Forbes Avenue and Halket Street, in the Oakland section of Pittsburgh.
3. Magee-Womens Hospital participates as an approved provider of health services in the Commonwealth of Pennsylvania Medical Assistance Program.
4. Under the Commonwealth Program, the Hospital renders medical services to Medical Assistance recipients and at a later date expects to be reimbursed by the Department of Public Welfare at rates established by the Department.
5. Following the United States Supreme Court decisions of *Roe v. Wade* and *Doe v. Bolton* in January, 1973, Magee-Womens Hospital has been providing abortions to all Medical Assistance recipients without requiring the documented evidence from the performing physician and two other physicians as required by the Department of Public Welfare regulations for Medical Assistance reimbursement of abortions and has been submitting claims for said reimbursement for these abortions to the Department of Public Welfare.

6. The Department of Public Welfare has rejected each of these claims for reimbursement for abortions provided to Medical Assistance recipients because of Magee-Womens Hospital's failure to comply with Department's procedures governing Medical Assistance coverage of abortions. At the present time Magee-Womens Hospital's unsatisfied claims for reimbursement for abortions provided to Medical Assistance recipients exceeds \$200,000.00.

7. Because of the Department of Public Welfare's refusal to honor these claims, Magee-Womens Hospital is forced to abide by the recently announced rules and regulations for providing abortions to Medical Assistance recipients. Effective October 1, 1973, Magee-Womens Hospital will provide abortions to Medical Assistance recipients only if the patient can pay for the abortion or can furnish the documented medical evidence from three doctors required by the Department of Welfare for Medical Assistance coverage of abortions.

8. On October 1 and 2, 1973, the first two days in which the new procedures were in effect, Magee-Womens Hospital was forced to turn down abortion requests of at least sixteen Medical Assistance recipients because they could not pay for the abortions or furnish the necessary documented medical evidence from three doctors.

9. Over the past several months Magee-Womens Hospital has been providing an average of more than sixty abortions per month to Medical Assistance recipients.

10. Magee-Womens Hospital will be forced to continue to turn down abortion requests of Medical Assistance recipients unless the Department of Public Welfare procedures governing Medical Assistance coverage of abortions are changed.

ALTERED BY AGREEMENT OF COUNSEL

C. R. Youngquist
C. Robert Youngquist

Sworn to and subscribed before me this 3rd day of October, 1973.

Helen K. [Illegible]
Notary Public

My Commission Expires April 1, 1976

Member, Pennsylvania Association of Notaries

*Commonwealth of Pennsylvania,
County of Allegheny, ss:*

AFFIDAVIT OF HENRY J. SMITH

Henry J. Smith, being duly sworn, deposes and says:

1. I am the Director of Fiscal Services at Magee-Womens Hospital.
2. My responsibilities include submitting Medical Assistance claims of Magee-Womens Hospital to the Department of Public Welfare for reimbursement.
3. The Pennsylvania Medical Assistance Program provides reimbursement for sterilization services furnished to Medical Assistance recipients, regardless of whether the sterilization is "elective" or "medically indicated".
4. Within the past year, Magee-Womens Hospital received Medical Assistance reimbursement for sterilization services provided to more than 100 Medical Assistance recipients. In most of these cases, the sterilization services were "elective" rather than "medically indicated". In no case was a claim refused because the sterilization services was elective rather than medically indicated.
5. The claims submitted by Magee-Womens Hospital for Medical Assistance reimbursement clearly indicated the nature of the services provided. The forms submitted for female Medical Assistance recipients specifically stated that the services provided were tubal ligation or

laparoscopy and for male Medical Assistance recipients that the services provided were vasectomy.

Henry J. Smith
Henry J. Smith

Sworn to and subscribed before this 2 day of November, 1973.

Notary Public
[Illegible stamp]

AFFIDAVIT IN SUPPORT OF TEMPORARY
RESTRAINING ORDER

Commonwealth of Pennsylvania,
County of Allegheny, ss:

RUTH DOE, being duly sworn, deposes and says:

1. I make [t]his affidavit in conjunction with the suit filed by me in the United States District Court against officials of the Commonwealth of Pennsylvania and I make it in support of the prayer therein for a Temporary Restraining Order and for injunctive relief to prevent defendants from conducting themselves in such a way as to deny me an abortion.

2. I am a real person residing in Pittsburgh, Allegheny County, Pennsylvania with my 4½ month old child.

3. Ruth Doe is not my true legal name. I have adopted that name solely for the purposes of this lawsuit to maintain anonymity.

4. I am presently separated and pregnant and have made the decision not to carry my pregnancy through to birth because of the burden and interruption to my personal life the birth would cause.

5. I presently receive Public Assistance from the Commonwealth of Pennsylvania under the AFDC Program and I am eligible for medical services under the Medical Assistance Program.

6. I have attempted to obtain an abortion at Magee Women's Hospital but was refused. The reason given for the refusal was that because I did not have enough money

for the services and could not get two doctors to write letters for me.

ALTERED BY AGREEMENT OF COUNSEL

7. My inability to obtain an abortion has caused and will continue to cause me severe emotional anguish.

Ruth Doe

Ruth Doe

Sworn to and subscribed before me this 1st day of
October, 1973.

Mary Eileen Jennings,
Notary Public

Pittsburgh, Allegheny Coun-
ty

My Commission Expires May 22, 1976

Member, Pennsylvania Association of Notaries

*Commonwealth of Pennsylvania,
County of Allegheny, ss:*

**AFFIDAVIT IN SUPPORT OF TEMPORARY
RESTRAINING ORDER**

TONI DOE, being duly sworn, deposes and says:

1. I make this affidavit in conjunction with the suit filed by me in the United States District Court against officials of the Commonwealth of Pennsylvania and I make it in support of the prayer therein for a Temporary Restraining Order and for injunctive relief to prevent defendants from conducting themselves in such a way as to deny me an abortion.

2. I am a real person residing in Pittsburgh, Allegheny County, Pennsylvania with my mother and three children, aged 4, 2 and 1.

3. Toni Doe is not my true legal name. I have adopted that name solely for the purposes of this lawsuit to maintain anonymity.

4. I am presently unmarried and pregnant and have made the decision not to carry my pregnancy through to birth because of the burden and interruption to my personal life the birth would cause.

5. I presently receive Public Assistance from the Commonwealth of Pennsylvania under the AFDC Program and I am eligible for medical services under the Medical Assistance Program.

6. I have attempted to obtain an abortion at Magee Women's Hospital but was refused. The reason given for

the refusal was that because I did not have enough money for the services and could not get two doctors to write letters for me.

7. I do not seek to terminate my pregnancy for any of the purposes contained in the Department of Public Welfare procedures governing Medical Assistance coverage of abortions.

ALTERED BY AGREEMENT OF COUNSEL

7. My inability to obtain an abortion has caused and will continue to cause me severe emotional anguish.

Tony Doe
Toni Doe

Sworn to and subscribed before me this 1st day of October, 1973.

Mary Eileen Jennings,
Notary Public
Pittsburgh, Allegheny County

My Commission Expires May 22, 1976

Member, Pennsylvania Association of Notaries

*Commonwealth of Pennsylvania,
County of Allegheny, ss:*

**AFFIDAVIT IN SUPPORT OF TEMPORARY
RESTRAINING ORDER**

NANCY DOE, being duly sworn, deposes and says:

1. I make this affidavit in conjunction with the suit filed by me in the United States District Court against officials of the Commonwealth of Pennsylvania and I make it in support of the prayer therein for a Temporary Restraining Order and for injunctive relief to prevent defendants from conducting themselves in such a way as to deny me an abortion.

2. I am a real person residing in Pittsburgh, Allegheny County, Pennsylvania, but Nancy Doe is not my true legal name. I have adopted that name solely for the purposes of this lawsuit to maintain anonymity.

3. I am presently unmarried and pregnant and have made the decision not to carry my pregnancy through to birth because of the burden and interruption to my personal life the birth would cause.

4. I presently receive Public Assistance from the Commonwealth of Pennsylvania under the AFDC Program and I am eligible for medical services under the Medical Assistance Program.

5. I have attempted to obtain an abortion at Magee Women's Hospital but was refused. The reason given for the refusal was that because I did not have enough money for the services and could not get two doctors to write letters for me.

6. I do not seek to terminate my pregnancy for any of the purposes contained in the Department of Public Welfare procedures governing Medical Assistance coverage of abortions.

ALTERED BY AGREEMENT OF COUNSEL

7. My inability to obtain an abortion has caused and will continue to cause me severe emotional anguish.

Nancy Doe

Nancy Doe

Sworn to and subscribed before me this 1st day of October, 1973.

Mary Eileen Jennings.

Notary Public

Pittsburgh, Allegheny County

My Commission Expires May 22, 1976

Member, Pennsylvania Association of Notaries

*Commonwealth of Pennsylvania,
County of Allegheny, ss:*

**AFFIDAVIT IN SUPPORT OF TEMPORARY
RESTRAINING ORDER**

PATRICIA DOE, being duly sworn, deposes and says:

1. I make this affidavit in conjunction with the suit filed by me in the United States District Court against officials of the Commonwealth of Pennsylvania and I make it in support of the prayer therein for a Temporary Restraining Order and for injunctive relief to prevent defendants from conducting themselves in such a way as to deny me an abortion.

2. I am a real person residing in Pittsburgh, Allegheny County, Pennsylvania, but Patricia Doe is not my true legal name. I have adopted that name solely for the purposes of this lawsuit to maintain anonymity.

3. I am presently unmarried and pregnant and have made the decision not to carry my pregnancy through to birth because of the burden and interruption to my personal life the birth would cause.

4. I presently receive Public Assistance from the Commonwealth of Pennsylvania and I am eligible for medical services under the Medical Assistance Program.

5. I have attempted to obtain an abortion at Magee Women's Hospital but was refused. The reason given for the refusal was that because I did not have enough money for the services and could not get two doctors to write letters for me.

ALTERED BY AGREEMENT OF COUNSEL

6. My inability to obtain an abortion has caused and will continue to cause me severe emotional anguish.

Patricia Doe
Patricia Doe

Sworn to and subscribed before me this 1st day of October, 1973.

Mary Eileen Jennings,
Notary Public
Pittsburgh, Allegheny County

My Commission Expires May 22, 1976

Member, Pennsylvania Association of Notaries

Commonwealth of Pennsylvania,
County of Allegheny, ss:

**AFFIDAVIT IN SUPPORT OF TEMPORARY
RESTRAINING ORDER**

CATHY DOE, being duly sworn, deposes and says:

1. I make this affidavit in conjunction with the suit filed by me in the United States District Court against officials of the Commonwealth of Pennsylvania and I make it in support of the prayer therein for a Temporary Restraining Order and for injunctive relief to prevent defendants from conducting themselves in such a way as to deny me an abortion.

2. I am a real person residing in Apollo, Armstrong County, Pennsylvania, but Cathy Doe is not my true legal name. I have adopted that name solely for the purposes of this lawsuit to maintain anonymity.

3. I am presently unmarried and pregnant, and have made the decision not to carry my pregnancy through to birth because I already have four children and another child would further burden our financial plight and cause severe stress on me.

4. I presently receive an Aid to Dependent Children Public Assistance grant and I have been determined eligible for a white Medical Assistance card from the Department of Public Welfare.

5. I attempted to obtain an abortion from Magee Women's Hospital, but was refused. The reason given for the refusal was that because I did not have enough money

for either their services or for the services of two doctors to give me a physical examination.

ALTERED BY AGREEMENT OF COUNSEL

6. Unless I receive an immediate abortion, my own emotional state will continue to deteriorate and my medical problems will become more and more complicated.

Cathy Doe

Cathy Doe

Sworn to and subscribed before me this 1st day of October, 1973.

Mary Eileen Jennings,

Notary Public

Pittsburgh, Allegheny County

My Commission Expires May 22, 1976

Member, Pennsylvania Association of Notaries

*Commonwealth of Pennsylvania,
County of Allegheny, ss:*

**AFFIDAVIT IN SUPPORT OF TEMPORARY
RESTRAINING ORDER**

ANN DOE, being duly sworn, deposes and says:

1. I make this affidavit in conjunction with the suit filed by me in the United States District Court against officials of the Commonwealth of Pennsylvania and I make it in support of the prayer therein for a Temporary Restraining Order and for injunctive relief to prevent defendants from conducting themselves in such a way as to deny me an abortion.

2. I am a real person residing in Pittsburgh, Allegheny County, Pennsylvania, but Ann Doe is not my true legal name. I have adopted that name solely for the purposes of this lawsuit to maintain anonymity.

3. I am presently unmarried and pregnant, and have made the decision not to carry my pregnancy through to birth because of medical problems I presently have and also because I do not want any more children.

4. I presently receive a Public Assistance grant and I have been determined eligible for a white Medical Assistance card from the Department of Public Welfare.

5. I attempted to obtain an abortion from Magee Women's Hospital, but was refused. The reason given for the refusal was that because I did not have enough money for either their services or for the services of two doctors to give me a physical examination.

6. Because of the lateness of my pregnancy and other medical problems, I understand the longer I wait for the abortion the more medically risky it becomes.

ALTERED BY AGREEMENT OF COUNSEL

7. My inability to obtain an abortion has caused me severe emotional distress which I will not be able to overcome unless an abortion is obtained.

Ann Doe

Ann Doe

Sworn to and subscribed before me this 1st day of October, 1973.

Mary Eileen Jennings,

Notary Public

Pittsburgh, Allegheny County

My Commission Expires May 22, 1976

Member, Pennsylvania Association of Notaries

*Commonwealth of Pennsylvania,
County of Allegheny, ss:*

**AFFIDAVIT IN SUPPORT OF TEMPORARY
RESTRAINING ORDER**

BETTY DOE, being duly sworn, deposes and says:

1. I make this affidavit in conjunction with the suit filed by me in the United States District Court against officials of the Commonwealth of Pennsylvania and I make it in support of the prayer therein for a Temporary Restraining Order and for injunctive relief to prevent defendants from conducting themselves in such a way as to deny me an abortion.

2. I am a real person residing in Pittsburgh, Allegheny County, Pennsylvania, but BETTY DOE is not my true legal name. I have adopted that name solely for the purposes of this lawsuit to maintain anonymity.

3. I am presently unmarried and pregnant, and have made the decision not to carry my pregnancy through to birth because a birth at my age would be a severe burden on my life as well as my family.

4. I presently receive a Public Assistance grant and I have been determined eligible for a white Medical Assistance card from the Department of Public Welfare.

5. My efforts to obtain an abortion from Magee Women's Hospital were futile because I did not have enough money and my Medical Assistance I was told would not cover the services.

I attempted to obtain an abortion from Magee Women's Hospital, but was refused. The reason given for the

refusal was that I did not have enough money for either their services or for the services of two doctors to give me a physical examination.

ALTERED BY AGREEMENT OF COUNSEL

6. My pregnancy and inability to terminate it have caused great stress on both my family and myself and we are in desperate need of immediate relief from this situation.

Betty Doe
Betty Doe

Sworn to and subscribed before me this 1st day of
October, 1973.

Mary Eileen Jennings,
Notary Public
Pittsburgh, Allegheny County

My Commission Expires May 22, 1976

Member, Pennsylvania Association of Notaries

*Commonwealth of Pennsylvania,
County of Allegheny, ss:*

**AFFIDAVIT IN SUPPORT OF TEMPORARY
RESTRAINING ORDER**

DONNA DOE, being duly sworn, deposes and says:

1. I make this affidavit in conjunction with the suit filed by me in the United States District Court against officials of the Commonwealth of Pennsylvania and I make it in support of the prayer therein for a Temporary Restraining Order and for injunctive relief to prevent defendants from conducting themselves in such a way as to deny me an abortion.

2. I am a real person residing in Braddock, Allegheny County, Pennsylvania, but Donna Doe is not my true legal name. I have adopted that name solely for the purposes of this lawsuit to maintain anonymity.

3. I am presently unmarried and pregnant, and have made the decision not to carry my pregnancy through to birth because I am still in high school and do not wish to have a baby at this time.

4. I presently receive an Aid to Dependent Children Public Assistance grant and I have been determined eligible for a white Medical Assistance card from the Department of Public Welfare.

5. I attempted to obtain an abortion from Magee Women's Hospital, but was refused. The reason given for the refusal was that because I did not have enough money for either their services or for the services of two doctors to give me a physical examination.

ALTERED BY AGREEMENT OF COUNSEL

6. My unwanted pregnancy has already caused me severe emotional stress and has complicated my education and relationships with other people to the point where I need immediate relief from my situation.

Donna Doe

Donna Doe

Sworn to and subscribed before me this 1st day of
October, 1973.

Mary Eileen Jennings,

Notary Public

Pittsburgh, Allegheny Coun-
ty

My Commission Expires May 22, 1976

Member, Pennsylvania Association of Notaries

*Commonwealth of Pennsylvania,
County of Allegheny, ss:*

**AFFIDAVIT IN SUPPORT OF TEMPORARY
RESTRAINING ORDER**

ELAINE DOE, being duly sworn, deposes and says:

1. I make this affidavit in conjunction with the suit filed by me in the United States District Court against officials of the Commonwealth of Pennsylvania and I make it in support of the prayer therein for a Temporary Restraining Order and for injunctive relief to prevent defendants from conducting themselves in such a way as to deny me an abortion.

2. I am a real person residing in Pittsburgh, Allegheny County, Pennsylvania, but Elaine Doe is not my true legal name. I have adopted that name solely for the purposes of this lawsuit to maintain anonymity.

3. I am presently unmarried and pregnant, and have made the decision not to carry my pregnancy through to birth because my two children and myself are already in financial difficulty and a birth at this time would be a severe burden on my emotional state.

4. I presently receive an Aid to Dependent Children Public Assistance grant and I have been determined eligible for a white Medical Assistance card from the Department of Public Welfare.

5. I attempted to obtain an abortion from Magee Women's Hospital, but was refused. The reason given for the refusal was that because I did not have enough money

for either their services or for the services of two doctors to give me a physical examination.

ALTERED BY AGREEMENT OF COUNSEL

6. Because I have been unable to obtain an abortion I have suffered severe emotional anguish and have already had to drop out of school.

Elaine Doe
Elaine Doe

Sworn to and subscribed before me this 1st day of
October, 1973.

Mary Eileen Jennings,
Notary Public
Pittsburgh, Allegheny County

My Commission Expires May 22, 1976
Member, Pennsylvania Association of Notaries

*Commonwealth of Pennsylvania,
County of Allegheny, ss:*

**AFFIDAVIT IN SUPPORT OF TEMPORARY
RESTRAINING ORDER**

JANE DOE, being duly sworn, deposes and says:

1. I make this affidavit in conjunction with the suit filed by me in the United States District Court against officials of the Commonwealth of Pennsylvania and I make it in support of the prayer therein for a Temporary Restraining Order and for injunctive relief to prevent defendants from conducting themselves in such a way as to deny me an abortion.

2. I am a real person residing in Pittsburgh, Allegheny County, Pennsylvania, but Jane Doe is not my true legal name. I have adopted that name solely for the purposes of this lawsuit to maintain anonymity.

3. I am presently unmarried and pregnant and have made the decision not to carry my pregnancy through to birth because of the burden and interruption to my personal life the birth would cause.

4. I presently receive Public Assistance from the Commonwealth of Pennsylvania and I am eligible for medical services under the Medical Assistance Program.

5. I have attempted to obtain an abortion at Magee Women's Hospital but was refused. The reason given for the refusal was that because I did not have enough money for the services and could not get two doctors to write letters for me.

ALTERED BY AGREEMENT OF COUNSEL

6. My inability to obtain an abortion has caused and will continue to cause me severe emotional anguish.

Jane Doe
Jane Doe

Sworn to and subscribed before me this 1st day of
October, 1973.

Mary Eileen Jennings,
Notary Public
Pittsburgh, Allegheny County

My Commission Expires May 22, 1976

Member, Pennsylvania Association of Notaries

*Commonwealth of Pennsylvania,
County of Allegheny, ss:*

**AFFIDAVIT IN SUPPORT OF TEMPORARY
RESTRAINING ORDER**

SYLVIA DOE, being duly sworn, deposes and says:

1. I make this affidavit in conjunction with the suit filed by me in the United States District Court against officials of the Commonwealth of Pennsylvania and I make it in support of the prayer therein for a Temporary Restraining Order and for injunctive relief to prevent defendants from conducting themselves in such a way as to deny me an abortion.

2. I am a real person residing in Pittsburgh, Allegheny County, Pennsylvania with my husband and two children, aged five and two.

3. Sylvia Doe is not my true legal name. I have adopted that name solely for the purposes of this lawsuit to maintain anonymity.

4. I am presently pregnant and have made the decision not to carry my pregnancy through to birth because of the burden and interruption to my personal life the birth would cause.

5. I presently receive Public Assistance from the Commonwealth of Pennsylvania and I am eligible for medical services under the Medical Assistance Program.

6. I have attempted to obtain an abortion at Magee Women's Hospital but was refused. The reason given for the refusal was that because I did not have enough money

for the services and could not get two doctors to write letters for me.

ALTERED BY AGREEMENT OF COUNSEL

7. My inability to obtain an abortion has caused and will continue to cause me severe emotional anguish.

Sylvia Doe
Sylvia Doe

Sworn to and subscribed before me this 1st day of
October, 1973.

Mary Eileen Jennings,
Notary Public
Pittsburgh, Allegheny County

My Commission Expires May 22, 1976

Member, Pennsylvania Association of Notaries

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 73-846

Ann Doe; Betty Doe, a minor, by her mother as representative, Mother B. Doe; Cathy Doe; Donna Doe, a minor, by her mother as representative, Mother D. Doe; Elaine Doe; Jane Doe, a minor, by her father as representative, Father J. Doe; Nancy Doe; Patricia Doe; Ruth Doe; Sylvia Doe; and Toni Doe, each individually and on behalf of all other women similarly situated,

Plaintiffs,

vs.

Helene Wohlgemuth, individually and as Secretary of the Department of Public Welfare, Commonwealth of Pennsylvania; Roger Cutt, individually and as Assistant Deputy Secretary for Medical Services, Commonwealth of Pennsylvania; Glenn Johnson, individually and as Chief of the Bureau of Medical Assistance, Commonwealth of Pennsylvania; Edward Kalberer, individually and as Executive Director of the Allegheny County Board of Assistance; and the Department of Public Welfare, of the Commonwealth of Pennsylvania

Defendants,

Before: Weis, Circuit Judge, Sorg, District Judge and
Snyder, District Judge

OPINION AND ORDER

SNYDER, District Judge

The Plaintiffs, as welfare recipients and participants in the Pennsylvania Medical Assistance Program (PMAP), have filed their Complaint on behalf of themselves and all others similarly situated against the Pennsylvania Department of Public Welfare (Department) and certain of its Officers and/or Administrative Representatives. They challenge the State of Pennsylvania's refusal to provide reimbursement for the cost of abortions which they sought to have performed at Magee-Womens Hospital, Pittsburgh, Pennsylvania. The Department's Procedures hold that abortions may be performed under the PMAP only in the following situations:¹

"1. There is documented medical evidence that continuance of the pregnancy may threaten the health or life of the mother;

2. There is documented medical evidence that the infant may be born with incapacitating physical deformity or mental deficiency; or

3. There is documented medical evidence that a continuance of a pregnancy resulting from legally

¹ While neither Counsel for the Plaintiffs nor for the Department referred this Court to a governing regulation, it was agreed that the above set forth criterion as excerpted from an Opinion Letter of the Attorney General dated August 6, 1973, correctly stated the requirements.

established statutory or forcible rape or incest, may constitute a threat to the mental or physical health of a patient;

4. Two other physicians chosen because of their recognized professional competency have examined the patient and have concurred in writing; and

5. The procedure is performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals."

Jurisdiction was claimed under 28 U.S.C. §§1343 (3)² and (4)³ as derived from 42 U.S.C. §1983⁴. The Plaintiffs claim that Title XIX of the Social Security Act requires reimbursement of physicians and hospital services for abortions which they elect; and they further claim the unre-

² Section 1343: "Civil rights and elective franchise

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;"

³ "(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

⁴ Section 1983: "Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

stricted right of such reimbursement under the Equal Protection Clause of the Fourteenth Amendment and the right to privacy as recognized in *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) rehearing denied 410 U.S. 959, 93 S.Ct. 1409, 35 L.Ed.2d 694.

After hearing, the District Court on October 9, 1973, granted a Preliminary Injunction directing the Defendants to pay the reasonable costs of medical services rendered for any abortion performed in Allegheny County, Pennsylvania (as requested by the Plaintiffs) by a licensed physician on a woman otherwise eligible for PMAP benefits without additionally meeting the criterion hereinabove set forth.

On the same date, the Court filed an Order requesting the convening of a Three Judge Court, as there appeared to be a substantial constitutional question as to whether the Department's State-wide Regulations and Procedures were consistent with the Social Security Act or operated to deny the Plaintiffs equal protection of the law. See: *U.S. Dept. of Agriculture, et al. v. Jacinta Moreno*, U.S. , 93 S. Ct. 2821, 37 L.Ed.2d 782 (1973); *Wilwording v. Swenson*, 404 U.S. 249, 92 S.Ct. 407, 30 L.Ed.2d 418 (1971); *King v. Smith*, 392 U.S. 309, 88 S.Ct. 2128, 20 L.Ed.2d 1118 (1968); *Charleston v. Wohlgemuth*, 332 F. Supp. 1175 (E.D. Pa. 1971) affirmed 405 U.S. 970, 92 S.Ct. 1204, 31 L.Ed.2d 246. Determination of the Class was referred to the Three Judge Court. On October 12, 1973, Chief Judge Collins J. Seitz of the Third Circuit duly ordered the empaneling of the Three Judge Court. On October, 25, 1973, the Defendants filed an Answer which denied that the Plaintiffs had standing to sue, that the Court had subject matter jurisdiction over the cause of action,

and that the Plaintiffs' Complaint stated a cause of action for which relief could be granted.

A distillation of the PMAP shows that Pennsylvania is a participating State in a cooperative plan for providing reimbursement for medical services to the indigent under the Social Security Act (42 U.S.C. §1396 *et seq.*) The Act makes provision for medical services to the "categorically needy" (42 U.S.C. §1396a(a)(13), 45 CFR 249.10(a)(1)), or to the "medically needy" (42 U.S.C. §1396a(a)(10)(B), 45 CFR 249.10(a)(2)). Pennsylvania provides services to the "medically needy". 62 P.S. §441.1 reads as follows:

"The following persons shall be eligible for medical assistance:

(1) Persons who receive or are eligible to receive cash assistance grants under this article;

(2) Persons who meet the eligibility requirements of this article for cash assistance grants except for citizenship durational residence and any eligibility condition or other requirement for cash assistance which is prohibited under Title XIX of the Federal Social Security Act; and

(3) The medically needy."

It is noted that this last phrase is not otherwise defined, except by 62 P.S. §442.1:

"A person shall be considered medically needy if he:

(1) Resides in Pennsylvania, regardless of the duration of his residence or his absence therefrom; and

(2) Meets the standards of financial eligibility established by the department with the approval of the Governor. In establishing these standards the department shall take into account (i) the funds certified by the Budget Secretary as available for medical assistance for the medically needy; (ii) pertinent Federal legislation and regulations; and (iii) the cost of living."

At the hearing before this Court, the parties stipulated that the allegations of fact contained in the Affidavits of R. Stanton Wettick, Jr., Douglass S. Thompson, C. Robert Youngquist, Henry J. Smith, and each of the named Plaintiffs would be accepted as true. From these, it is readily determined that the Plaintiffs had all been certified by the Department as eligible for participation in the PMAP; their pregnancies ranged from six to seventeen weeks; each of the named Plaintiffs were without assets to pay for an abortion or for any examination by physicians other than those at the Hospital or as would be provided by the Hospital; and, none of them were able to meet *all* of the requirements of the Department but, nevertheless, desired abortions. Prior to the issuance of the Injunction, each of the Plaintiffs unsuccessfully attempted to obtain an abortion from the Hospital (Magee-Womens Hospital), and the Hospital advised them that it could not provide the abortions unless, the abortions were either paid for in advance or the particular individuals submitted the documented matters required for reimbursement by the PMAP. The Hospital further advised each of the Plaintiffs that it had no procedures whereby doctors could be provided without charge to the Plaintiffs for the examination required by the PMAP. The Hospital then refused to provide abortions to each of the named Plaintiffs. It was fur-

ther certified that the Hospital would have provided the abortions if the costs had been reimbursable under the PMAP.

Magee-Womens Hospital is a non-profit institution located in the City of Pittsburgh and is an approved provider of health services under the PMAP. The prior practice of the physicians associated with the Hospital was to schedule abortions within the first eleven weeks of pregnancy because the medical procedures used for abortion during that time period involved significantly lower risks of morbidity and mortality than such procedures at any later stage of pregnancy. The Hospital did not provide abortions to women more than twenty weeks pregnant without special permission and only in extremely unusual cases. Family Planning Services were provided to Medical Assistance recipients, and pharmacists filled prescriptions written by physicians at the Hospital for contraceptives. The costs for these services were reimbursed by the Department, regardless of whether the recipient was married or unmarried.

Following the United States Supreme Court decisions in *Roe v. Wade, supra*, and *Doe v. Bolton*, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973) *rehearing denied* 410 U.S. 959, 93 S.Ct. 1410, 35 L.Ed.2d 694, the Hospital began providing abortions to all Medical Assistance recipients without requiring the documented evidence from a performing physician and two other physicians, and had been submitting claims for reimbursement to the Department (about sixty per month). The Department rejected each of the claims for reimbursement because of the Hospital's failure to comply with the Department's Procedures. Effective October 1, 1973, the Hospital provided abortions only if the patient could pay for the abortion or could

furnish the documented medical evidence required by the Department.

The Affidavit of each of the Plaintiffs substantially set forth in similar language that each of the "Does" was unmarried and pregnant and had made the decision not to carry the pregnancy through to birth. Ann Doe elected to have an abortion because of "medical problems I presently have and also because I do not want any more children." She indicated she was refused abortion because she did not have the money or the necessary documentation. Betty Doe elected abortion "because a birth at my age would be a severe burden on my life as well as my family." Cathy Doe's decision was because "I already have four children and another child would further burden our financial plight and cause severe stress on me." Donna Doe's decision was "because I am still in high school and do not wish to have a baby at this time." Elaine Doe's decision was "because my two children and myself are already in financial difficulty and a birth at this time would be a severe burden on my emotional state." Jane Doe's decision was "because of the burden and interruption to my personal life that the birth would cause." Nancy Doe's decision was "because of the burden and interruption to my personal life that the birth would cause." Patricia, Ruth, Sylvia, and Toni, all had substantially the same reasons as Nancy Doe.

At the hearing, the Three Judge Court requested the Attorney General to secure an affidavit relating to the intention of the Department with respect to any change that might be contemplated regarding its requirements for reimbursement for abortions. Subsequently, an Affidavit was filed by an Assistant Attorney General, to the effect

that there was no intention on the part of the Department to change its current policies.

The Three Judge Court also requested the Assistant Attorney General to procure from the United States Department of Health, Education and Welfare, a statement of their position on reimbursement for abortions. He subsequently filed a copy of a Memorandum of the United States as Amicus Curiae in the cases of *New York State Department of Social Services, et al. v. Elizabeth Linda Klein, et al.*, No. 72-770, and *Nassau County Medical Center, et al. v. Elizabeth Linda Klein, et al.*, No. 72-803, October Term 1972, dated May 1973, which took the position, in substance, that the Social Security Act *did not require*, but would not prevent, a Federally funded State Medicaid Program to pay for abortions that were not medically indicated. New York had limited coverage under its Medicaid Program for "the cost of care, services and supplies, which are necessary to prevent, diagnose, correct or cure conditions in the person that cause acute suffering, endanger life, result in illness or infirmity, interfere with his capacity for normal activity, or threaten some significant handicap." The State, in an "administrative letter", interpreted the provision as covering only "necessary and medically indicated care" and, therefore, denied "elective abortions not medically indicated." *City of New York v. Wyman*, 30 N.Y.2d 537, 281 N.E.2d 180 (1972). No violation of the Federal program was found in this situation.

On December 27, 1973, this Court notified the Attorney General that the Amicus Curiae Brief filed in the *Klein* cases did not satisfy the requirements of the Three Judge Court, and requested that an affidavit be supplied

with respect to the position of the Department of H.E.W. on the question of reimbursement of the cost of abortions, whether medically indicated or not. On January 12, 1973, the Assistant Attorney General notified the Court by letter that he was unable to secure the cooperation of the United States with respect to obtaining an affidavit of the type requested by the Court. He stated that the Brief in the *Klein* cases had been submitted in lieu of an affidavit and accurately reflected the position of the United States in the matter. Apparently, however, the Federal Government would share in the costs of abortions under the terms and provisions of the State Medical Program.⁵

It must be noted that in dealing with the issues in this case we are precluded from the treatment of abortion on moral grounds, nor are we dealing with abortion in its criminal aspects. We must follow the course which recog-

⁵ The Attorney General of Pennsylvania in the letter of August 6, 1973, set forth the following at footnote 4 of the letter:

"4 Even before *Wade* and *Bolton, supra*, the Federal statute and regulations permitted reimbursement to the states for the cost of abortions. In response to an inquiry as to whether or not the Federal Government reimbursed the states for abortions under the Medical Assistance Program, the Federal Medical Services Administration, which administers the program, replied:

"* * * The following statement may be used to describe M.S.A.'s policy on abortions:

The position taken by M.S.A. on abortions is that the Social Security Act and the HEW regulations provides for Federal matching of state expenditures for all kinds of medical care and services, including patient and hospital services, outpatient hospital services, physician services, drugs, etc. If the State Medicare Program paid for these services whether for abortion or any other medical services, the Federal Government shared the cost with the state."

nizes that the law does not represent itself as a moral code, but rather, as a body of rules wherein the majority of the people impose their will, and, within constitutional limits, invade the freedom of the individual, in the interest of public health and welfare. Whatever may be the private view of the individual or group of individuals, or the members of this Court, we are bound by the now established principle of law that a negation of an individual's choice in the matter of abortion during the first trimester of pregnancy is an unwarranted invasion of that person's fundamental rights as established by the Fourteenth Amendment to the Constitution of the United States.

The Supreme Court has said (*Roe v. Wade, supra*, 93 S.Ct. 726, 728):

"This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is . . . in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."

* * * * *

"Although the results are divided, most of these courts have agreed that the right of privacy, however based, is broad enough to cover the abortion decision; that the right, nonetheless, is not absolute and is subject to some limitations; and that at some point the state interests as to protection of health, medical standards, and prenatal life, become dominant. We agree with this approach."

Thus, we are here concerned with "fundamental rights" which must be balanced against "compelling state

interests" where legislative enactments including State-wide Regulations pursuant thereto must be narrowly drawn to express only state interests. *Kramer v. Union Free School District*, 395 U.S. 621, 627, 89 S.Ct. 1886, 1890, 23 L.Ed.2d 583 (1969); *Shapiro v. Thompson*, 394 U.S. 618, 634, 89 S.Ct. 1322, 1331, 22 L.Ed.2d 600 (1969); *Griswold v. Connecticut*, 381 U.S. 479, 485, 85 S.Ct. 1678, 1682, 14 L.Ed.2d 510 (1965); *Aptheker v. Secretary of State*, 378 U.S. 500, 508, 84 S.Ct. 1659, 1664, 12 L.Ed.2d 992 (1964); *Sherbert v. Verner*, 374 U.S. 398, 406, 83 S.Ct. 1790, 1795, 10 L.Ed. 2d 965 (1963); *Cantwell v. Connecticut*, 310 U.S. 296, 307-308, 60 S.Ct. 900, 904-905, 84 L.Ed. 1213 (1940). See *Eisenstadt v. Baird*, 405 U.S. 438, 460, 463-464, 92 S.Ct. 1029, 1042, 1043-1044, 31 L.Ed.2d 349 (1972) (White, J., concurring).

I. STANDING

The Defendants contend that the Plaintiffs have no standing to bring this action seeking reimbursement to the Hospital. Each of the Plaintiffs in this case is a participant in the Medicaid Program established and regulated by Sub-Chapter XIX of the Social Security Act of 1953, as amended, Section 1396 *et seq.* of Title 42 U.S.C. Each of the Plaintiffs desired an abortion and in none of these cases was there an attempt to fully comply with the requirements of the PMAP. This Court finds that the State's Procedures, limiting reimbursement as indicated, operated to prevent the Plaintiffs from obtaining the abortions they sought. It was admitted that the Hospital would have furnished the Plaintiffs with the abortions if these abortions had been reimburseable under the PMAP.

At the threshold of the question of standing is the concept recently set forth by the Supreme Court of the United States in *Goldberg v. Kelly*, 396 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970), (involving the determination that procedural due process under the Fourteenth Amendment required an evidentiary hearing before termination of welfare benefits under the Aid to Families with Dependent Children Program (AFDC)), (at footnote 8, 25 L.Ed.2d at 295):

"It may be realistic today to regard welfare entitlements as more like 'property' than a 'gratuity.' Much of the existing wealth in this country takes the form of rights that do not fall within traditional common-law concepts of property. It has been aptly noted that '[s]ociety today is built around entitlement. The automobile dealer has his franchise, the doctor and lawyer their professional licenses, the worker his union membership, contract, and pension rights, the executive his contract and stock options; all are devices to aid security and independence. Many of the most important of these entitlements now flow from government: subsidies to farmers and businessmen, routes for airlines and channels for television stations; long term contracts for defense, space, and education; social security pensions for individuals. Such sources of security, whether private or public, are no longer regarded as luxuries or gratuities; to the recipients they are essentials, fully deserved, and in no sense a form of charity. It is only the poor whose entitlements, although recognized by public policy, have not been effectively enforced.' Reich, Individual Rights and Social Welfare; The Emerging Legal Issues, 74 Yale LJ 1245, 1255

(1965). See also Reich, The New Property, 73 Yale LJ 733 (1964)."

The Supreme Court thus held in *Goldberg* (25 L.Ed. 2d at pp. 295-297):

"Appellant does not contend that procedural due process is not applicable to the termination of welfare benefits. Such benefits are a matter of statutory entitlement for persons qualified to receive them. Their termination involves state action that adjudicates important rights. The constitutional challenge cannot be answered by an argument that public assistance benefits are 'a "privilege" and not a "right."' *Shapiro v. Thompson*, 394 US 618, 627 n 6, 22 L Ed 2d 600, 611, 89 S Ct 1322 (1969). Relevant constitutional restraints apply as much to the withdrawal of public assistance benefits as to disqualification for unemployment compensation, *Sherbert v Verner*, 374 US 398, 10 L Ed 2d 965, 83 S Ct 1790 (1963); or to denial of a tax exemption, *Speiser v Randall*, 357 US 513, 2 L Ed 2d 1460, 78 S Ct 1332 (1958); or to discharge from public employment, *Slochower v Board of Higher Education*, 350 US 551, 100 L Ed 692, 76 S Ct 637 (1956). The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss,' *Joint Anti-Fascist Refugee Committee v McGrath*, 341 US 123, 168, 95 L Ed 817, 852, 71 S Ct 624 (1951) (Frankfurter, J., concurring), and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication. Accordingly, as we said in *Cafeteria & Restaurant Workers Union v McElroy*, 367 US 886, 895, 6 L Ed 2d 1230,

1236, 81 S Ct 1743 (1961), 'consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.' See also *Hannah v. Larche*, 363 US 420, 440, 442, 4 L Ed 2d 1307, 1320, 1321, 80 S Ct 1502 (1960).

It is true, of course, that some governmental benefits may be administratively terminated without affording the recipient a pre-termination evidentiary hearing. But we agree with the District Court that when welfare is discontinued, only a pre-termination evidentiary hearing provides the recipient with procedural due process. Cf. *Sniadach v. Family Finance Corp.*, 395 US 337, 23 L Ed 2d 349, 89 S Ct 1820 (1969). For qualified recipients, welfare provides the means to obtain essential food, clothing, housing, and medical care. Cf. *Nash v. Florida Industrial Commission*, 389 US 235, 239, 19 L Ed 2d 438, 442, 88 S Ct 362 (1967). Thus the crucial factor in this context—a factor not present in the case of the black-listed government contractor, the discharged government employee, the taxpayer denied a tax exemption, or virtually anyone else whose governmental entitlements are ended—is that termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits. Since he lacks independent resources, his situation becomes immediately desperate. His need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from the welfare bureaucracy."

Relevant constitutional restraints therefore apply to public assistance benefits and their recipients, and there is standing in welfare recipients to challenge State-wide Regulations which exclude welfare recipients who would otherwise be covered by Medical Assistance. *Shapiro v. Thompson, supra*; *King v. Smith, supra*. Cf. *Data Processing Service v. Camp*, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed. 2d 184 (1970) (holding that the question of standing is the question of whether the interest sought to be protected by the complainant is arguably within the zone of interest to be protected or regulated by the statute or constitutional guarantee in question, 25 L.Ed. 2d at 188). When a person or a family has a spiritual stake in First Amendment values sufficient to give standing to raise issues concerning the "establishment" clause and the "free exercise" clause, *Abbington School District v. Schempp*, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed. 2d 844 (1963); or when standing may reflect "aesthetic, conservational, and recreational, as well as economic values", *Office of Communication of United Church of Christ v. F.C.C.*, 123 U.S. App. D.C. 328, 334-340, 359 F.2d 994, 1000-1006 (1966); then standing certainly arises from the economic injury on which the Petitioners here rely. *U.S. Dept. Agriculture v. Moreno, supra*; *Goldberg v. Kelly, supra*; *Stewart v. Wohlgenuth*, 355 F. Supp. 1212 (W.D. Pa. 1972). The named Plaintiffs thus have standing to bring the instant action.

II. CLASS ACTION DETERMINATION

A difficult question is involved in the determination of the proper class. The Plaintiffs allege that they were females of child bearing age and all were certified by the Department as eligible under the PMAP. The Plaintiffs

then allege that they brought this action on behalf of themselves and all others similarly situated pursuant to Rule 23 (b) (2) of the Federal Rules of Civil Procedure." The Primary Judge refused to order the case to be maintained as a class action, and deferred the decision of this question to the Three Judge Court.

After due consideration, this Court determines that the action shall not be maintained as a class action because the differing individual circumstances which exist would unnecessarily complicate this action, and thus, a class action under Rule 23 Fed.R.Civ.P. would not be a superior method for adjudication of this controversy. See: *Tindall v. Hardin*, 337 F. Supp. 563 (W.D. Pa. 1972) *affirmed sub nomine Carter v. Butz*, 479 F.2d 1084 (3rd Cir. 1973). See also *Stewart v. Wohlgemuth*, *supra*. This is particularly true in light of the considerations which are involved in the "trimester" holdings of the United States Supreme Court in *Roe v. Wade*, *supra*, and in *Doe v. Bolton*, *supra*; and the reversal of *Klein v. Nassau County Medical Center*, 347 F. Supp. 496 (E.D.N.Y. 1972) (Three Judge Court), at U.S. , 93 S.Ct. 2747, 37 L.Ed. 2d 152 (1973), where the judgment was vacated and the case remanded to the United States District Court for further consideration in light of *Roe v. Wade*, *supra*, and *Doe v. Bolton*, *supra*.

In view of the fact that the Court is holding the Regulations and/or Procedures of the PMAP to be unconstitutional, as more particularly hereinafter set forth, we are

⁶ Rule 23(b)(2) provides: "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole".

confident that the Defendants will respect the Order of this Court, and we do not at this time need to become involved in the complexities of a class action. Separate actions can be disposed of as they may arise. See *Bailey v. Patterson*, 369 U.S. 31, 82 S.Ct. 549, 7 L.Ed. 2d 512 (1962); *Turner v. Colonial Finance Corp.*, 467 F.2d 202 (1st Cir. 1972). The Court, therefore, directs that the cases not be maintained as a class action.

It is necessary, therefore, with respect to the Plaintiffs here involved, that we decide the two basic attacks made against the Regulations and/or Procedures of the PMAP: (1) that the Pennsylvania Regulations are inconsistent with the Social Security Act, and thereby violate the Supremacy Principle, and (2) that the Pennsylvania Regulations create an unlawful distinction (in violation of the Equal Protection Clause) between indigent women who choose to carry their pregnancies to birth and indigent women who choose to terminate their pregnancies by abortion.

III. THE PENNSYLVANIA MEDICAL ASSISTANCE PROGRAM IS NOT INCONSISTENT WITH THE SOCIAL SECURITY ACT

The Federal Government makes substantial funds available to those States desiring to participate in the program to provide medical care to individuals and families "whose income and resources are insufficient to meet the costs of necessary medical services", Title XIX of the Social Security Act, 42 U.S.C. §1396 *et seq.* Under the Act, participating States are required to provide medical services to individuals and families who are eligible for cash grant assistance under any of the Federal categories of as-

sistance, such as, Aid to the Blind, Aid to the Permanently and Totally Disabled, Old Age Assistance, Aid to Families with Dependent Children, 42 U.S.C. §1396a(a)(13). These individuals and families are considered the "categorically needy". 45 CFR 249.10(a)(1).

A second group of individuals termed "medically needy" may also benefit under this Act, and is composed of those persons whose income is too great to qualify for cash assistance as "categorically needy", and yet insufficient to meet the costs of medical care. 42 U.S.C. §1396a(a)(10)(B). This group also consists of individuals benefiting from Federal money available to meet the cost of administration of a Medical Assistance Program, or others who do not come under one of the Federal categories. 45 CFR 248.10(d)(1). As stated before, Pennsylvania has elected to extend medical benefits to the "medically needy". 62 P.S. §441.1 *et seq.*

A statutory requirement for participating States is that they must provide certain minimal medical services under the program. For "categorically needy" persons, the State must provide: (1) inpatient hospital services; (2) outpatient hospital services; (3) other laboratory and X-ray services; (4) skilled nursing facility services, screening and diagnosis of children, family planning services and supplies furnished to individuals of child bearing age; and (5) physicians' services furnished by a physician whether in the office, patient's home, hospital or elsewhere. 42 U.S.C. §1396a(a)(13)(B). For "medically needy" persons, the State has the option of providing from among the above five services, and Pennsylvania has elected to provide the five services as minimal services for the "medically needy", with the exception of the "screening and diagnosis of children."

The Plaintiffs contend that the abortion services which Pennsylvania has limited by its Procedure fall squarely within the category of "physicians' services" which are medically necessary and, therefore, within the requirements of the Social Security Act. Their argument is stated as follows (pp. 20 and 21 Plaintiffs' Brief):

"Under the Federal statutory scheme, inpatient hospital services fall into the same category as physicians' services i.e. they are minimally required for the 'categorically needy' and they are an elective minimal requirement by Pennsylvania as to the 'medically needy.' 42 U.S.C. §1396a(a)(13)(B) and (C). Inpatient hospital services (other than services in an institution for tuberculosis or mental diseases) are defined as follows by H.E.W. regulations:

'Inpatient hospital services' are those items and services *ordinarily furnished by the hospital* for the care and treatment of inpatients provided under the direction of a physician or dentist in an institution maintained primarily for treatment and care of patients with disorders other than tuberculosis or mental diseases and which is licensed . . . 45 C.F.R. 249.10(b)(1) (emphasis added)'

While a hospital may be free under *Doe v. Bolton, supra*, to refuse to permit abortive surgery within its confines, nothing legally prevents a hospital from including abortions as an 'ordinarily furnished' service. (Magee-Womens Hospital, for example, has been performing abortions on a regular basis.) And under the above H.E.W. regulations, the State is not free to refuse to reimburse hospitals for services they are providing on a regular basis. Consequently,

Pennsylvania's policy of refusing reimbursement for abortion services, at least to the extent such reimbursement is for inpatient hospital services, is a violation of Federal law."

* * * * *

"After the Supreme Court decisions in *Roe v. Wade, supra*, and *Doe v. Bolton, supra*, it is clear that absolutely no State law can constitutionally exclude abortion services from the scope of practice of a physician. Consequently, Pennsylvania's practice of refusing to reimburse for abortion services, at least to the extent such services represent physicians' services, violates the Social Security Act in that it does not provide for the minimum level of coverage required by the Act."

The question remains: Whether the Pennsylvania Procedures governing reimbursement for costs of abortions are compatible with the Federal Statute? We believe this question must be answered in the affirmative.

In order to qualify for Federal funding, state programs must satisfy the requirements of 42 U.S.C. §1396a, including the requirement of §1396a(a) (17) that "a state plan for medical assistance must include reasonable standards * * * for determining eligibility for and the extent of medical assistance under the plan which (A) are consistent with the objectives of this subchapter, * * *". Physicians' services with regard to an abortion may be considered to fall within the purview of necessary medical services under Title XIX, and the Department does not dispute this fact. While nowhere in the Act is there a specific provision authorizing medical assistance payments for abortions, there are a number of sections that, when

considered together with corollary regulations, must be interpreted to permit reimbursement for the costs of abortions performed. These include: 42 U.S.C. §1396d(a) 1, and 45 CFR 249.10(b) (1) which pertain to inpatient hospital services; 42 U.S.C. §1396d(a) (5) and 45 CFR 249.10(b) (5) which apply to physicians' services; 42 U.S.C. §1396d(a) (6) and 45 CFR 249.10(b) (6) which relate to medical care or any other type of remedial care recognized under State law, furnished by licensed practitioners within the scope of their practice as defined by State law; and 42 U.S.C. §1396(a) (4) and 45 CFR 249.10(a) (10) which would include services in relation to family planning.

But, even if we assume, as do the Plaintiffs, that abortion payments are clearly authorized under Title XIX of the Social Security Act, nevertheless, Congress has given the States great latitude in establishing standards for the administration of the various plans, under the doctrine of a "scheme of cooperative federalism." (Emphasis supplied). *N Y S Dept. of Social Services v. Dublino*, U.S. , S.Ct. , 37 L.Ed. 2d 688 (1973). (The Social Security Act does not bar a state from independently requiring individuals to accept employment as a condition for receipt of federally funded aid to families with dependent children); *Jefferson v. Hackney*, 406 U.S. 535, 92 S. Ct. 1724, 32 L. Ed. 2d 285 (1972). (Allowing Texas to grant the full standard of need assistance under Old Age Assistance while granting only 95% of the full standard of need to Aid for Blind and Aid for Permanently and Totally Disabled, and 75% of the full standard of need to Aid to Families with Dependent Children, AFDC); Cf. *King v. Smith, supra*, (Invalidating the Alabama "substitute father" regulation which denied AFDC payments

to children of a mother who "cohabits" in or outside her home with any single or married man, holding that: (20 L.Ed. 2d at 1127):

"Alabama's argument based on its interest in discouraging immorality and illegitimacy would have been quite relevant at one time in the history of the AFDC program. However, subsequent developments clearly establish that these state interests are not presently legitimate justifications for AFDC disqualification. Insofar as this or any similar regulation is based on the State's asserted interest in discouraging illicit sexual behavior and illegitimacy, it plainly conflicts with federal law and policy."

Thus, the question becomes: Whether or not Pennsylvania may, by means of its Regulations and/or Procedures, determine when the performance of an abortion becomes a medical necessity?

In *Dandridge v. Williams*, 397 U.S. 471, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (1970), the Supreme Court of the United States upheld a Maryland maximum grant regulation limiting the total amount of aid any one family unit could receive under the State's Aid to Families with Dependent Children Program (AFDC) against attack on the grounds that it is in conflict with the Social Security Act of 1935 and with the Equal Protection Clause of the Fourteenth Amendment. After referring to the legislative history of the program, the Court determined that Maryland was entitled to establish its own standard of need with regard to each eligible family unit without contravening the purposes of the AFDC Program, holding as follows (25 L. Ed. 2d at pp. 496-498):

"In its original opinion the District Court held that the Maryland regulation does conflict with the federal statute, and also concluded that it violates the Fourteenth Amendment's equal protection guarantee. After reconsideration on motion, the court issued a new opinion resting its determination of the regulation's invalidity entirely on the constitutional ground. Both the statutory and constitutional issues have been fully briefed and argued here, and the judgment of the District Court must, of course, be affirmed if the Maryland regulation is in conflict with either the federal statute or the Constitution. We consider the statutory question first, because if the appellees' position on this question is correct, there is no occasion to reach the constitutional issues. *Ashwander v. TVA*, 297 U.S. 288, 346-347, 80 L. Ed. 688, 710, 711, 56 S. Ct. 466 (Brandeis, J., concurring); *Rosenberg v. Fleuti*, 374 U.S. 449, 10 L. Ed. 2d 1000, 83 S. Ct. 1804.

I.

The appellees contend that the maximum grant system is contrary to §402(a)(10) of the Social Security Act, as amended, which requires that a state plan shall 'provide . . . that all individuals wishing to make application for aid to families with dependent children shall have opportunity to do so, and that aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals.' The argument is that the state regulation denies benefits to the younger children in a large family. Thus, the appellees say, the regulation is in patent violation of the Act, since those younger children are just as 'dependent' as their older siblings

under the definition of 'dependent child' fixed by federal law. See *King v. Smith*, 392 U.S. 309, 20 L. Ed. 2d 1118, 88 S. Ct. 2128. Moreover, it is argued that the regulation, in limiting the amount of money any single household may receive, contravenes a basic purpose of the federal law by encouraging the parents of large families to 'farm out' their children to relatives whose grants are not yet subject to the maximum limitation.

It cannot be gainsaid that the effect of the Maryland maximum grant provision is to reduce the per capita benefits to the children in the largest families. Although the appellees argue that the younger and more recently arrived children in such families are totally deprived of aid, a more realistic view is that the lot of the entire family is diminished because of the presence of additional children without any increase in payments. Cf. *King v. Smith, supra*, at 335 n. 4, 20 L. Ed. 2d at 1135 (Douglas, J., concurring). It is no more accurate to say that the last child's grant is wholly taken away than to say that the grant of the first child is totally rescinded. In fact, it is the *family* grant that is affected. Whether this per capita diminution is compatible with the statute is the question here. For the reasons that follow, we have concluded that the Maryland regulation is permissible under the federal law.

In *King v. Smith, supra*, we stressed the States' 'undisputed power,' under these provisions of the Social Security Act, 'to set the level of benefits and the standard of need.' *Id.*, at 334, 20 L. Ed. 2d at 1135. We described the AFDC enterprise as 'a scheme of cooperative federalism,' *id.*, at 316, 20

L. Ed. 2d at 1125, and noted carefully that '[t]here is no question that States have considerable latitude in allocating their AFDC resources, since each State is free to set its own standard of need and to determine the level of benefits by the amount of funds it devotes to the program.' *Id.*, at 318-319, 20 L. Ed. 2d at 1126."

In the case before this Court, as noted previously, Congress was silent with respect to specific authorization of medical assistance for abortions. Pennsylvania standards must be scrutinized without curtailment by Congressional action and the State Regulations and/or Procedures must be given great latitude in providing for the administration of the Program. We, therefore, feel compelled to find Pennsylvania's Regulations do not conflict with Title XIX of the Social Security Act.

IV. PENNSYLVANIA'S PROCEDURES RESTRICTING MEDICAL REIMBURSEMENT FOR ABORTIONS VIOLATE EQUAL PROTECTION CLAUSE OF FOURTEENTH AMENDMENT

The Plaintiffs further contend that since pregnant women need medical services in connection with their pregnancies, a distinction between indigent pregnant women who choose to carry their pregnancies to birth and indigent pregnant women who choose to terminate their pregnancies by abortion, deprive women who choose abortion of their equal protection rights guaranteed by the Fourteenth Amendment to the United States Constitution.

The Supreme Court in a recent decision of *Cleveland Board of Education, et al. v. Jo Carol LaFleur, et al.*, and *Susan Cohen v. Chesterfield County School Board, et al.*,

42 U.S. Law Week 4186, decided January 21, 1974, in an Opinion by Justice Stewart, speaking for Mr. Justices Brennan, White, Marshall, and Blackmun, and concurred in by Justice Douglas, held unconstitutional certain regulations of Cleveland, Ohio and Chesterfield County, West Virginia, relating to mandatory leave rules applied to pregnant school teachers and stated the following (at p. 4189):

"This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment. *Roe v. Wade*, 410 U.S. 113; *Loving v. Virginia*, 388 U.S. 1, 12; *Griswold v. Connecticut*, 381 U.S. 479; *Pierce v. Society of Sisters*, 268 U.S. 510; *Meyer v. Nebraska*, 262 U.S. 390. See also *Prince v. Massachusetts*, 321 U.S. 158; *Skinner v. Oklahoma*, 316 U.S. 535. As we noted in *Eisenstadt v. Baird*, 405 U.S. 438, 453, there is a right 'to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.'

By acting to penalize the pregnant teacher for deciding to bear a child, overly restrictive maternity leave regulations can constitute a heavy burden on the exercise of these protected freedoms. Because public school maternity leave rules directly affect 'one of the basic civil rights of man,' *Skinner v. Oklahoma*, *supra*; at 541, the Due Process Clause of the Fourteenth Amendment requires that such rules must not needlessly, arbitrarily, or capriciously impinge upon this vital area of a teacher's constitutional liberty."

Under traditional Equal Protection standards, once the State chooses to pay for medical services rendered in connection with the pregnancies of some indigent women, it cannot refuse to pay for the medical services rendered in connection with the pregnancies of other indigent women electing abortion, unless the disparate treatment supports a legitimate State interest. *U.S. Dept. of Agriculture v. Moreno*, *supra*; *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 92 S. Ct. 1400, 31 L. Ed. 2d 768 (1972); *Reed v. Reed*, 404 U.S. 71, 92 S. Ct. 251, 30 L. Ed. 2d 225 (1971); *Eisenstadt v. Baird*, *supra*. The Court in *King v. Smith*, *supra*, well summarized public welfare policy as follows (20 L. Ed. 2d at pp. 1127, 1130):

"A significant characteristic of public welfare programs during the last half of the 19th century in this country was their preference for the 'worthy' poor. Some poor persons were thought worthy of public assistance, and others were thought unworthy because of their supposed incapacity for 'moral regeneration.' *H. Leyendecker, Problems and Policy in Public Assistance* 45-57 (1955); *Wedemeyer & Moore, The American Welfare System*, 54 Calif. L. Rev. 326, 327-328 (1966). This worthy-person concept characterized the mothers' pension welfare programs, which were the precursors of AFDC. See *W. Bell, Aid to Dependent Children*, 3-19 (1965). Benefits under the mothers' pension programs, accordingly, were customarily restricted to widows who were considered morally fit. See *Bell, supra*, at 7; *Leyendecker, supra*, at 53."

* * * * *

"The most recent congressional amendments to the Social Security Act further corroborate that fed-

eral public welfare policy now rests on a basis considerably more sophisticated and enlightened than the 'worthy-person' concept of earlier times. State plans are now required to provide for a rehabilitative program of improving and correcting unsuitable homes, §402(a), as amended by §201(a)(1)(B), 81 Stat 877, 42 U.S.C. §602(a)(14) (1964 ed., Supp. III); §406, as amended by §201(f), 81 Stat 880, 42 U.S.C. §606 (1964 ed., Supp. III); to provide voluntary family planning services for the purpose of reducing illegitimate births, §402(a), as amended by §201(a)(1)(C), 81 Stat 878, 42 U.S.C. §602(a)(15) (1964 ed., Supp. III); and to provide a program for establishing the paternity of illegitimate children and securing support for them, §402(a), as amended by §201(a)(1)(C), 81 Stat 878, 42 U.S.C. §602(a)(17) (1964 ed., Supp. III)."

Pennsylvania seeks to sustain its Procedures not on the basis that there is a lack of discrimination, but that there is no "invidious" discrimination and that the Procedures are rationally supportable on valid grounds.

The Department first of all contends that in the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. The Department states in its Brief (at p. 8):

"... A legislature may address a problem one step at a time or even select one phase of one field and apply a remedy there, neglecting others. So long as its judgments are rational, and not invidious, the legislature's efforts to tackle the problems of the poor and the needy are not subject to a constitutional

straightjacket. The very complexity of the problems suggests that there will be more than one constitutionally permissible method of solving them." Citing *Dandridge v. Williams, supra*; *Jefferson v. Hackney, supra*.

An analysis of *Dandridge v. Williams, supra*, however, does not give support to the State's contention in this case. In *Dandridge*, a fiscal basis was found by the Court for the State's interest in encouraging employment and avoiding discrimination between welfare families and the families of the working poor; for by combining the limit on a recipient's grant with permission to retain money earned, without reduction in the amount of the grant, Maryland provided an incentive to seek gainful employment. Certainly, no such fiscal interest can be promoted in the instant case where it is obvious that the cost of an abortion may well be far less than the cost of prenatal care, childbirth, and post partum treatment. Yet the State will pay the latter costs for any Medical Assistance recipient who does not elect abortion.

The Supreme Court in *Hagans v. Lavine, Commissioner of New York State Department of Social Services*, 42 L.W. 4381 at 4385, had this to say about the *Dandridge* case:

"In *Dandridge v. Williams, supra*, AFDC recipients challenged the Maryland maximum grant regulation on equal protection grounds. We held that the issue should be resolved by inquiring whether the classification had a rational basis. Finding that it did, we sustained the regulation. But *Dandridge* evinced no intention to suspend the operation of the Equal Protection Clause in the field of social wel-

fare law. State laws and regulations must still 'be rationally based and free from invidious discrimination.' 397 U.S. at 487. See *Jefferson v. Hackney*, 406 U.S. 535, 546 (1972); *Carter v. Stanton*, *supra*, 405 U.S. at 671; cf. *San Antonio School District v. Rodriguez*, 411 U.S. 1 (1973)."

Of course, a State cannot justify on the basis of fiscal integrity a regulation which would exclude a woman from Medical Assistance reimbursement because she has decided to exercise a constitutional right related to the decision as to whether to bear or beget a child. Thus, in *Shapiro v. Thompson*, *supra*, (which involved a residency requirement), the Court stated as follows (22 L. Ed. 2d at pp. 613, 614):

"Alternatively, appellants argue that even if it is impermissible for a State to attempt to deter the entry of all indigents, the challenged classification may be justified as a permissible state attempt to discourage those indigents who would enter the State solely to obtain larger benefits. We observe first that none of the statutes before us is tailored to serve that objective. Rather, the class of barred newcomers is all-inclusive, lumping the great majority who come to the State for other purposes with those who come for the sole purpose of collecting higher benefits. In actual operation, therefore, the three statutes enact what in effect are nonrebuttable presumptions that every applicant for assistance in his first year of residence came to the jurisdiction solely to obtain higher benefits. Nothing whatever in any of these records supplies any basis in fact for such a presumption.

More fundamentally, a State may no more try to fence out those indigents who seek higher welfare benefits than it may try to fence out indigents generally. Implicit in any such distinction is the notion that indigents who enter a State with the hope of securing higher welfare benefits are somehow less deserving than indigents who do not take this consideration into account. But we do not perceive why a mother who is seeking to make a new life for herself and her children should be regarded as less deserving because she considers, among other factors, the level of a State's public assistance. Surely such a mother is no less deserving than a mother who moves into a particular State in order to take advantage of its better educational facilities."

* * * * *

"We recognize that a State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens. It could not, for example, reduce expenditures for education by barring indigent children from its schools. Similarly, in the cases before us, appellants must do more than show that denying welfare benefits to new residents saves money. The saving of welfare costs cannot justify an otherwise invidious classification."

The Assistant Attorney General also contends that since the basic requirements as set forth in the Department's Procedures were those approved by the Joint Commission on Accreditation of Hospitals that, therefore, "An

examination of the requirements clearly reveals that although they may not serve with mathematical nicety, there can be no doubt that the instances where the Commonwealth will pay for an abortion are reasonable and logical. These requirements are set forth not by judges or lawyers, but by doctors who are immediately concerned with the problems of abortion." (Defendant's Brief p. 9). The difficulty with this position is that in this case we are not concerned with the views that doctors may have on the question of where, or under what circumstances, they might best choose to perform abortions. In each of the individual Plaintiff's allegations, as admitted by the Defendants, there were doctors available who did not consider it necessary that there be concurrence by two other physicians before the abortion was performed. These doctors did not consider that the abortion was necessary because of a threat to the health of the patient if the pregnancy was carried to term, or that it was necessary because the infant might be born with an incapacitating physical deformity or mental deficiency, or that it was necessary because the pregnancy resulted from statutory or forcible rape, which may have constituted a threat to the mental or physical health of the patient.

Roe v. Wade, supra, must be considered as dispositive of the contentions in the instant case. The Supreme Court held that the right of privacy was broad enough to include the abortion decision. (410 U.S. 153, 154, 93 S. Ct. 727, 35 L. Ed. 2d 177). Freedom of choice was recognized as a fundamental right during the first three months of pregnancy to be exercised by the pregnant woman in consultation with her physician free from State interference. The Court stated (410 U.S. at 163, 93 S. Ct. at 732, 35 L. Ed. 2d at 183):

"This means, . . . that, for the period of pregnancy prior to this 'compelling' point, *the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that in his medical judgment, the patient's pregnancy should be terminated.* If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State." (Emphasis added)

During this first trimester, State regulations impinging in any manner with a fundamental right must be examined with close scrutiny by the Courts. Thereafter, however, the State's legitimate interest in potential life becomes *compelling* and the State may reasonably regulate. The Court held (410 U.S. at p. 163, 93 S. Ct. at pp. 731-732, 35 L. Ed. 2d at pp. 182, 183):

"With respect to the State's important and legitimate interest in the health of the mother, the 'compelling' point, in the light of present medical knowledge, is at approximately the end of the first trimester. * * * It follows that, from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health. Examples of permissible state regulation in this area are requirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status; as to the licensing of the facility; and the like."

Therefore, since the PMAP serves to regulate the elective decision of the pregnant woman and her doctor

throughout the three trimesters, they are too broad and overreach the State's legitimate interest.

In the original Temporary Restraining Order, the relief that was granted was rather broad in nature. This was done in consideration of the fact that most of the Plaintiffs were in their first trimester of pregnancy; the few remaining Plaintiffs were not beyond their seventeenth week of pregnancy. These facts were considered along with the Affidavit of Douglass S. Thompson, an Associate Professor of Obstetrics and Gynecology at the University of Pittsburgh School of Medicine, the Director of the Division of Community Health at Magee-Womens Hospital and the Medical Director, Ob-Gyn Medical Care Center of Magee-Womens Hospital. In his Affidavit he stated that:

"It is the practice of all physicians associated with Magee-Womens Hospital to schedule abortions within the first eleven weeks of pregnancy if possible."

* * * * *

"Magee-Womens Hospital will not provide abortions to women who are more than twenty weeks pregnant without special permission for extremely unusual cases."

As for the accompanying Order, we intend to require payment by the PMAP for only elective abortions where the mother is *in* the first trimester of her pregnancy and *not* beyond the twelfth week of said pregnancy. The plaintiffs in their "Prayer for Relief" sought *inter alia*:

"This Court preliminarily and permanently enjoin defendants from refusing to pay the reasonable costs of abortion services prescribed by a qualified

physician and provided to women eligible for Medical Assistance."

After carefully scrutinizing the Regulations of PMAP and after reaching the conclusions that these Regulations do impinge on a fundamental right in the first trimester, the relief sought must be limited to that particular part of the pregnancy.

Pennsylvania has further contended that the PMAP cover only *necessary* medical services because of a need to conserve hospital space and State funds. We believe, however, that the Supreme Court in *Roe v. Wade, supra*, recognized that abortion is a necessary medical service for it may prevent specific and direct harm which is medically diagnosable (e.g. psychological harm), may protect the woman's future mental and physical health, and may prevent the distress associated with the unwanted pregnancy and child, (410 U.S. at p. 153, 93 S. Ct. at 727, 35 L. Ed. 2d at 177). Furthermore, every pregnant woman requires medical services in connection with her pregnancy. The expense of these services, the need for the use of more extensive hospital facilities, and the risk to the woman's health all increase as the pregnancy advances toward term. The State's classification of what is medically necessary must have some reasonable relation to the rationale behind the classification, and the non-therapeutic abortion, in the light of the *Roe* decision, cannot be validly classified as unnecessary.

As was stated by the District Court in *Klein v. Nassau County Medical Center, supra* (347 F. Supp. at p. 500):

"* * * Pregnancy is a condition which in today's society is universally treated as requiring medical care, prenatal, obstetrical and post-partum care, and un-

deniably it is provided under the Medicaid program as 'necessary' medical assistance although pregnancy is not an abnormal condition, nor does the medical assistance in childbirth 'cure' it. Medical assistance for abortion is not less 'necessary' because an election to bear the child would obviate that medical assistance and require instead other, more extensive and more expensive medical assistance. The pregnant woman, may not be denied necessary medical assistance because she has made an unwarrantedly disfavored choice, and no other basis appears here for denying Medical Assistance. *Eisenstadt v. Baird*, 1972, 405 U.S. 438, 452-453, 92 S. Ct. 1029, 31 L. Ed. 2d 349. State law articulates no policy that authorizes disfavoring one choice, and none other than the invalid argument based on the word 'necessary' is advanced."

It cannot be argued at this time that the justification for denying benefits to indigent women, who wish to terminate their pregnancies by abortion, is to discourage abortion. It is noted that the PMAP, by limiting Medical Assistance reimbursement of abortion costs does not distinguish between married pregnant women and unmarried pregnant women. In *Roe v. Wade*, *supra*, the Court suggested that discouraging illicit sexual conduct is not a serious argument for justifying restrictions on abortions; nor would there be any such nexus here. In *Doe v. Rampton*, 366 F. Supp. 189 (D.C. Utah 1973), a District Court held unconstitutional a Utah limitation on medical assistance coverage to therapeutic abortions ruling that the Plaintiff "would be denied equal protection of the law if the defendant, his agents and employees are permitted

to discriminate between 'therapeutic' and 'non-therapeutic' abortions in the administration of the Medicaid Program." See also *Comment, Abortion on Demand in Post-Wade Context: Must the State Pay the Bills?* 41 Fordham Law Review 921 (1973). We hold that the State's decision to limit coverage to "medically indicated" abortions, as arbitrarily determined by it, is a limitation which promotes no valid State interest. In the PMAP, the State has instituted a program to provide benefits to the poor; the State has excluded certain of the poor from the program; the exclusion denies Medical Assistance benefits to otherwise eligible applicants solely because they have elected to have an abortion, and the State has been unable to show that the exclusion of such persons promotes a compelling State interest. *Shapiro v. Thompson*, *supra*.

In *Hathaway v. Worcester City Hospital*, 475 F. 2d 701 (1st Cir. 1973), the Court stated as follows (at pp. 705, 706):

"But it seems clear, after *Roe* and *Doe*, that a fundamental interest is involved, requiring a compelling rationale to justify permitting some hospital surgical procedures and banning [the hospital here had a policy of barring use of facilities for sterilization operations] another involving no greater risk or demand on staff and facilities. While *Roe* and *Doe* dealt with a woman's decision whether or not to terminate a particular pregnancy, a decision to terminate the possibility of any future pregnancy would seem to embrace all of the factors deemed important by the Court in *Roe* in finding a fundamental interest, 410 U.S. at 155, 93 S. Ct. 705, but in magnified form, particularly so in this case given the demon-

strated danger to appellant's life and the eight existing children."

* * * * *

"We are merely saying, consistent with the Supreme Court's reasoning in *Shapiro* with regard to welfare payments, that once the state has undertaken to provide general short-term hospital care, as here, it may not constitutionally draw the line at medically indistinguishable surgical procedures that impinge on fundamental rights."

For the aforementioned reasons, we conclude that the Regulations and/or Procedures of the Pennsylvania Medical Assistance Program are unconstitutional because they are in violation of the Equal Protection Clause since they create an unlawful distinction between indigent women who choose to carry their pregnancies to birth, and indigent women who choose to terminate their pregnancies by abortion.

We further conclude that the State may not, by means of any statutes, regulations or procedures similar to those comprising the Pennsylvania Medical Assistance Program, unlawfully impinge upon the fundamental rights of any pregnant woman during the first three months or trimester of her pregnancy.

We do not here decide, as the Dissent would indicate, that the Commonwealth of Pennsylvania is constitutionally unable to limit its expenditures for medical services to those which are medically necessary simply because we hold that payments must be made for "elective" abortions. Rather we hold that the Commonwealth has already determined that the condition of pregnancy brings about the

necessity of medical services. The Commonwealth cannot then discriminate with respect to the methods of treatment for that condition, for in the first trimester of pregnancy, *Roe v. Wade, supra*, the selection of the method of treatment is the inviolable fundamental right of the physician and the patient.

It could not be controverted that if the Commonwealth adopted a regulation denying payment for medical services for the birth of an illegitimate child and, at the same time, provided payment for medical services for an abortion to prevent such a birth—such a regulation, which is but the other side of the same coin, would clearly be an unconstitutional discrimination. It is, therefore, the meaning of this Opinion that the Commonwealth has invidiously discriminated among persons equally eligible for assistance against those who seek medical treatment within the confines of a fundamental right.

As agreed by the Dissent, we are not to determine the presence or absence of a compelling State interest in the first trimester of pregnancy—the Supreme Court of the United States has eliminated this problem in declaring the fundamental right of the physician and patient as being paramount to the interest of the State. We do not hold that the State must finance a fundamental right, but we do hold that the expression of that fundamental right cannot be the basis for invidious discrimination.

An appropriate order will be entered.

ORDER

AND NOW, to-wit, this 3rd day of May, 1974, this Court declines to certify the Plaintiffs as representatives of a class for the reasons stated in the accompanying Opinion, and

Inasmuch as the requests of the original Temporary Restraining Order have been fulfilled, it is not necessary to take any further action with respect thereto; and any further action by this Court will be held in abeyance pending specific requests pursuant to this Opinion.

DANIEL J. SNYDER, JR.
United States District Judge
HERBERT P. SORG
United States District Judge

CC:

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IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 73-846

Ann Doe; Betty Doe, etc., et al., each individually and on
behalf of all other women similarly situated,
Plaintiffs

v.

Helen Wohlgemuth, individually and as Secretary of the
Department of Public Welfare, Commonwealth of Penn-
sylvania, et al.
Defendants

WEIS, Circuit Judge, dissenting:

As I view it, the effect of the majority opinion is that the Commonwealth of Pennsylvania is constitutionally unable to limit its expenditures for medical services to those which are medically necessary. I do not agree and respectfully dissent.¹

Preliminarily, it must be understood that we are not to determine if the qualified right to obtain an abortion is a fundamental constitutional right. That question has

¹ I agree that under *Super Tire Engineering Co. v. McCorkle*, U.S. , 42 U.S.L.W. 4507 (April 16, 1974), the plaintiffs have standing. I also concur in the court's finding that the State regulations are not in conflict with the federal statute.

been foreclosed by the United States Supreme Court decision in *Roe v. Wade*, 410 U.S. 113 (1973). Its invocation here obscures the basic issue—is the State required to pay for an elective, nonmedically necessary abortion when it does not fund other medically non-necessary services.

Insofar as the factual background is concerned, it was made clear at oral argument that the basic issue in this case centers around “elective” abortions, that is, those situations where there is no evidence of harm to the life or to the physical or emotional health of the mother. If those factors were involved, then Pennsylvania would pay for the necessary services and that matter is not at issue here.² Therefore, the point that I address is the situation where there is no threat to the life or health of the mother and the election of an abortion is purely because of personal preference.³ Thus, the question here is not whether the State may prohibit certain categories of abortions by statute or practice. It does not do so. The issue is whether the Constitution has thrust upon Pennsylvania an affirmative burden to pay for an elective abortion because the legislature has decided that the State will pay for those abortions for the indigent arising from medical necessity. My conclusion is in the negative because there is no constitutional requirement that the State must finance the exercise of a “fundamental” right, nor does a classification which distinguishes between medically necessary and

² The Commonwealth asserts that it does pay the fees of physicians to perform the preliminary examination and the contentions of the plaintiffs to the contrary appear to be in error.

³ There is no question that the issue does not arise as to the second or third trimester because of the *Roe v. Wade*, *supra*, decision limiting its thrust to the first trimester.

non-necessary abortions offend the Equal Protection Clause.

That the State has an affirmative duty to pay for the implementation of fundamental rights is, with certain narrowly carved exceptions, contrary to the weight of constitutional authority. The unusual situation may be typified by *Griffin v. Illinois*, 351 U.S. 12 (1956), requiring that an indigent criminal defendant be furnished with transcripts at State expense. In an analogous situation, *Boddie v. Connecticut*, 401 U.S. 371 (1971), held that an indigent could not be barred from securing a divorce because of inability to pay State assessed filing fees. To be precise, the State was not required to pay the fees but to forego collecting them.⁴ The common element to these cases in this carefully limited category is a State “monopoly” on the effective forum, *i.e.*, the courts. It is crucial here that the State has no monopoly on performing abortions and in fact is not in the business to any degree. It is only the money from the State which is at issue and the absence of State funds, on this record, will not absolutely prevent the plaintiffs from obtaining the services which they desire.⁵ It is important, also, in keeping this case in

⁴ The later cases of *U.S. v. Kras*, 409 U.S. 434 (1973), and *Ortwein v. Schwab*, 410 U.S. 656 (1973), indicate that this principle would not be extended to cover such matters as bankruptcy and state appellate court filing fees in civil cases. Note the distinction between requiring the state to pay out money, as in the transcript cases, as compared to the situation where the state has imposed a monetary obstacle, *e.g.*, filing fee. Similarly, one must recognize that there may be a difference between cases arising under the due process clause and those based on equal protection.

⁵ It may be assumed that various non-profit organizations interested in advancing their point of view of the desirability of

perspective to realize that there is nothing other than its own desire to be recompensed which prevented the Magee-Womens Hospital from performing these procedures. The State created no obstacle, the hospital did. State money may make it easier and more convenient to obtain an abortion but that is not a legitimate basis for creating a constitutional mandate.

With the exception of the narrow area referred to, it is clear that there is no constitutional requirement that a State must fund fundamental rights. A scrutiny of representative Supreme Court determinations on the "fundamental" right classification, including those in the right of privacy category, demonstrates no corollary of required State subsidy.

While *Shapiro v. Thompson*, 394 U.S. 618 (1969),⁶ found the right to travel among the states to be fundamental, no suggestion has been made that transportation charges for the indigent must be paid by the State.

abortion on demand realistically could be expected to give financial assistance if approached. While it has been urged that the existence of private charitable funds should not enter into consideration of cases involving welfare rights, for example, it is an element which points out that payment of monies, not the exercise of fundamental rights, is the point of issue here.

⁶ Shapiro found a residency requirement invalid when it prevented a welfare recipient from receiving payments needed for "the very means to subsist—food, shelter, and other necessities of life," 394 U.S. at 627. *Memorial Hospital v. Maricopa County*,

U.S. , 42 U.S.L.W. 4277 (February 26, 1974), similarly struck down residency requirements when used to deny medical care which was necessary for the preservation of health. But in *Vlandis v. Kline*, 412 U.S. 441 (1973), a residency requirement affecting the amount of tuition to be paid at a State university was not found to be a per se restriction on the right to travel.

While a person may have a fundamental right of privacy to have obscene material in his home, *Stanley v. Georgia*, 394 U.S. 557 (1969), there have been no serious contentions that the State must furnish such material for the indigent. The fundamental rights of freedom of speech and of the press impose no duty on the State to purchase public address systems or printing presses for those unable to pay for them.

I have elaborated perhaps more than necessary the point that although a right may be classified as "fundamental," there is no inherent requirement that there be financial implementation by the State. The principle is important here because it is only when a fundamental right is sought to be regulated or restricted that the State must show a compelling interest to justify its action. In applying such a standard to a purely funding situation, I believe the majority errs.⁷

Absent a fundamental constitutional right basis, the plaintiffs' claim of denial of equal protection must necessarily be analyzed within the less restrictive requirement of a rational relationship to a legitimate governmental in-

⁷ See page 33. Similarly, *Hathaway v. Worcester City Hospital*, 475 F. 2d 701 (1st Cir. 1973), is distinguishable because funding was not the issue. *Roe v. Rampton*, 366 F. Supp. 189 (D. Utah 1973), did not meet the issue involved here. In that case the State refused to pay for all abortions.

Cleveland Board of Education v. LaFleur, U.S. , 42 U.S. L.W. 4186 (January 21, 1974), was decided on the basis of due process and the use of irrebuttable presumptions to penalize a fundamental right. There the plaintiffs were deprived of wages and employment opportunities because of their decision to bear a child. Here, the plaintiffs are not being deprived of welfare rights or of income because of their decision to have an abortion.

terest. *Jefferson v. Hackney*, 406 U.S. 535 (1971), *Richardson v. Belcher*, 404 U.S. 78 (1971), *Dandridge v. Williams*, 397 U.S. 471 (1970).

Simply stated, it is Pennsylvania's position that it will fund only medically necessary procedures for the poor. The State has not chosen to provide a plan of total, comprehensive, all encompassing medical care for those who meet the indigency requirements.⁸ It does not aim to provide such services as may be "elective" or merely desired. While a financial basis for such a broad policy is obvious, another consideration may be the additional strain on limited medical facilities and resources. Nor can we ignore the difficult legislative judgment as to where to draw the line so that the medical services furnished without charge to the indigent are not so grossly disproportionate to those which may be available to those who, while not indigent, have little money to pay for necessary care, let alone electives, after paying for the absolute necessities of life.⁹

⁸ "The Department of Public Welfare pays for those types of medical and allied services given in the home, office, clinic, or hospital, that are recognized as necessary treatment of illness."

"There is no intention to pay for extravagant or superfluous medical care, or care that would be beyond the means of the average family of moderate income." Section 9100(E)(1) Department of Public Welfare Pennsylvania Manual.

⁹ In this context, we find the comment of Justice Powell, although dealing with education, most apt:

"The ultimate wisdom as to these and related problems is not likely to be devined for all time even by the scholars who now so earnestly debate the issues. In such circumstances the judiciary is well advised to refrain from interposing, on the States inflexible constitutional restraints that could circumscribe or handicap the

Having once established a valid basis for its general policy, e.g., payment for only necessary medical expenses, the State does not violate the Equal Protection Clause if the classification is imperfect, lacks mathematical exactness, or in practice may result in some inequities. *Jefferson v. Hackney*, *supra*, *Dandridge v. Williams*, *supra*.

While the plaintiffs contend that elective abortions are ultimately less costly than prenatal, delivery, and post-natal services, I do not find this monetary argument convincing. It may be argued just as forcefully that from the financial standpoint allowing the child to be born will produce a tax paying citizen whose contribution to the State in his lifetime will exceed many times his cost of delivery.

A conspicuous example of the limited scope of the State's funding of medical services for the indigent is the refusal to pay for elective cosmetic surgery.¹⁰ No one contends that this practice offends the Equal Protection Clause even though such services have been paid by the State in some instances when found to be medically necessary.

Surely, no one can argue seriously that in view of the holding that the right to have an abortion has been found to be a fundamental one, the right to receive plastic surgery is not equally so. There can be no doubt that an attempt by a State to impose criminal sanctions upon those seeking or administering such procedures would be struck down as unconstitutional. And yet that consideration does

continued research and experimentation so vital to finding even partial solutions . . . and to keeping abreast of ever changing conditions." *San Antonio School District v. Rodriguez*, 411 U.S. 1, 43 (1973).

¹⁰ Section 9411.213, D.P.W.—Pa. Manual.

not transform what is an elective into a medically necessary operation. The majority's reasoning that dictum in *Roe v. Wade, supra*, makes all abortions, elective or not, into medically necessary ones is logically and factually erroneous.

In the usual equal protection case the State is presumed to have acted within its constitutional powers, even though in practice some inequality may have resulted. *Lindsey v. Normet*, 405 U.S. 56 (1971). A statutory discrimination may not be invalidated if any set of facts may reasonably be conceived to justify it. *McGowan v. Maryland*, 360 U.S. 420 (1960). It is not every classification but only an invidious one that runs afoul of the Equal Protection Clause. *Jefferson v. Hackney, supra*.

A classification based on whether a procedure is medically necessary or unnecessary is not invidious. I dissent.

JOSEPH R. WEIS, J.
Circuit Judge

Dated: May 3, 1974

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 73-846

Ann Doe; Betty Doe, a minor, by her mother as representative, Mother B. Doe; Cathy Doe; Donna Doe, a minor by her mother as representative, Mother D. Doe; Elaine Doe; Jane Doe, a minor, by her father as representative, Father J. Doe; Nancy Doe; Patricia Doe; Ruth Doe; Sylvia Doe; and Toni Doe, each individually and on behalf of all other women similarly situated,

Plaintiffs,

vs.

Helene Wohlgemuth, individually and as Secretary of the Department of Public Welfare, Commonwealth of Pennsylvania; Roger Cutt, individually and as Assistant Deputy Secretary for Medical Services, Commonwealth of Pennsylvania; Glenn Johnson, individually and as Chief of the Bureau of Medical Assistance, Commonwealth of Pennsylvania; Edward Kalberer, individually and as Executive Director of the Allegheny County Board of Assistance; and the Department of Public Welfare, of the Commonwealth of Pennsylvania,

Defendants.

SUPPLEMENTAL ORDER

AND NOW, to-wit, this 28th day of May, 1974, the Plaintiffs having submitted specific Requests for Judgment, and upon due consideration thereof, IT IS HEREBY ADJUDGED AND DECREED that the Regulations and Procedures of the Department of Public Welfare of the Commonwealth of Pennsylvania, as they apply to reimbursement for abortions performed within the first twelve (12) weeks of pregnancy, are unconstitutional. In all other respects, Plaintiffs' Requests for Declaratory Judgment are denied.

IT IS FURTHER ADJUDGED AND DECREED that the Plaintiffs' Requests for Injunctive Relief are denied.

DANIEL J. SNYDER, JR.
United States District Judge
 HERBERT P. SORG
United States District Judge

CC:

R. Stanton Wettick, Jr., Esquire, 310 Plaza Building,
 Pittsburgh, Pa. 15219

Louis Kwall, Esquire, Office of the Attorney General,
 1402 State Office Building, Pittsburgh, Pa. 15222.

UNITED STATES COURT OF APPEALS
 FOR THE THIRD CIRCUIT

Nos. 74-1726 and 74-1727

Ann Doe; Betty Doe, a minor, by her mother as representative, Mother B. Doe; [Cathy Doe; Donna Doe,] a minor, by her mother as representative, Mother D. Doe; Elaine Doe, Jane Doe, a minor, by her father as representative, Father J. Doe; Nancy Doe; Patricia Doe; Ruth Doe; Sylvia Doe; and Toni Doe, each individually and on behalf of all other women similarly situated,

Appellees and Cross-Appellants,

v.

Helene Wohlgemuth, individually and as Secretary of the Department of Public Welfare, Commonwealth of Pennsylvania; Roger Cutt, individually and as Assistant Deputy Secretary for Medical Services, Commonwealth of Pennsylvania; Glenn Johnson, individually and as Chief of the Bureau of Medical Assistance, Commonwealth of Pennsylvania; Edward Kalberer, individually and as Executive Director of the Allegheny County Board of Assistance; and the Department of Public Welfare, of the Commonwealth of Pennsylvania,

Appellants and Cross-Appellees.

D. C. Civil No. 73-846

Appeal From the United States District Court for the
Western District of Pennsylvania

Argued October 24, 1974

Before Kalodner, Van Dusen and Gibbons,
Circuit Judges

Norman J. Watkins, Deputy Attorney General
Robert F. Nagel, Deputy Attorney General
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OPINION OF THE COURT
(Filed Dec. 10, 1974)

KALODNER, *Circuit Judge*.

These cross-appeals are from the "Supplemental Order" of the three-judge District Court¹ which adjudged unconstitutional Regulations and/or Procedures ("Proce-

¹ Weis, Circuit Judge, and Sorg and Snyder, District Judges.

dures") of the Pennsylvania Medical Assistance Program ("PMAP") insofar as they pertain to reimbursement to welfare recipients for abortions performed within the first trimester of pregnancy, but denied declaratory relief as to abortions performed during the second trimester of pregnancy, and an application for injunctive relief.

The "Supplemental Order" was entered pursuant to the District Court's opinion² which held that the Procedures violate the equal protection clause of the Fourteenth Amendment in that their limitation of coverage to "medically indicated" abortions "is a limitation which promotes no valid State interest."³ The opinion further held that the Procedures did not conflict with the requirements of Title XIX of the Social Security Act, 42 U.S.C.A. §1396 et seq.

The defendant-representatives of the Commonwealth of Pennsylvania have appealed the District Court's "Supplemental Order" and the plaintiff-welfare recipients have appealed from the denial of declaratory relief as to abortions performed during the second trimester of pregnancy.

The District Court's dispositions were made in an action filed by the plaintiffs-welfare recipients and participants in the PMAP challenging the Procedures which provide that abortions may be performed under the PMAP only in the following situations:

"1. There is documented medical evidence that continuance of the pregnancy may threaten the health or life of the mother;

² The District Court's opinion, Judge Weis, dissenting, is reported at 376 F. Supp. 173 (W.D. Pa. 1974).

³ 376 F. Supp. at 191.

"2. There is documented medical evidence that the infant may be born with incapacitating physical deformity or mental deficiency; or

"3. There is documented medical evidence that a continuance of a pregnancy resulting from legally established statutory or forcible rape or incest, may constitute a threat to the mental or physical health of a patient;

"4. Two other physicians chosen because of their recognized professional competency have examined the patient and have concurred in writing; and

"5. The procedure is performed in a hospital accredited by the Joint Commission on Accreditation of hospitals." 376 F. Supp. at 175.

The "Supplemental Order" of the District Court was entered May 28, 1974, and these cross-appeals were argued to this Court on October 28, 1974.

It now appears that on September 18, 1974, the Attorney General of Pennsylvania filed a Stipulation in a pending independent action which declares that the Procedures here involved "have not been applied . . . when litigation is threatened," since July 8, 1974.

The Stipulation was filed in *Doe v. Wohlgemuth*, Civil Action No. 73-1564, United States District Court for the Eastern District of Pennsylvania,⁴ where welfare recipients have presented challenges raised in the instant

⁴ The action was instituted July 12, 1974, and a three-judge court was convened on September 18, 1974 pursuant to the provisions of 28 U.S.C.A. §§2281 and 2284.

case with respect to the Procedures and applied for declaratory and injunctive relief.

The Stipulation provides in relevant part as follows:

"In response to this Court's Order of July 19, 1974, the parties to this action hereby stipulate as follows:

"(1) The policy and practice challenged in this action is presently being applied on a uniform state-wide basis *except* as appears in paragraph (2) below.

"(2) a) *From on or about July 8, 1974, Defendants' Medicaid abortion policies have not been applied in any county in Pennsylvania when litigation is threatened by any eligible person seeking an abortion* and it appears to Defendants' counsel that a failure to reimburse for that abortion would result in repetitious litigation that would end in a court order granting preliminary relief against the Commonwealth. . . ." (emphasis supplied).

The inescapable import of the Stipulation of which we take judicial notice,⁵ is that the Procedures are enforced *only* against welfare recipients who do not threaten suit.

⁵ It is settled that this court may take judicial notice of developments since the taking of an appeal when they are relevant, and that we may further take judicial notice of pleadings in another case, especially where it presents a related issue. *Landy v. Federal Deposit Insurance Corporation*, 486 F.2d 139 (3d Cir. 1973), *cert. denied*, 416 U.S. 960 (1974); *Bryant v. Carleson*, 444 F.2d 353 (9th Cir. 1970), *cert. denied*, 404 U.S. 967; *Kalimian*

The sum total of the existing situation with respect to the Procedures is that they are enforced as to some welfare recipients and denied as to others.

Standing alone, and independently so, the stated circumstances constitute violation of the equal protection clause of the Fourteenth Amendment. That being so, we do not reach the holding of the court below that the Procedures *per se* violate the Fourteenth Amendment. Assuming *arguendo*, that the Procedures are constitutional and consistent with the Social Security Act, it is long settled that State administrative procedures which are *per se* valid and constitutional may nevertheless be enjoined when they are unconstitutionally applied. *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S. Ct. 1064, 30 L. Ed. 220 (1886).⁶

For the reasons stated, the "Supplemental Order" of the District Court will be vacated and the cause remanded to the District Court with directions to enter an order enjoining enforcement of the Pennsylvania abortion Procedures in accordance with this opinion.

v. Liberty Mutual Life Insurance Company, 300 F.2d 547 (2d Cir. 1962); *Funk v. Commissioner of Internal Revenue Service*, 163 F.2d 796 (3d Cir. 1947); *Zahn v. Transamerica Corporation*, 162 F.2d 36 (3d Cir. 1947).

The Pennsylvania Department of Welfare and its Secretary, defendants here, are also defendants in *Doe v. Wohlgemuth*, Civil Action No. 73-1564 (E.D. Pa.).

⁶ The Supreme Court has stressed that "a law nondiscriminatory on its face may be grossly discriminatory in its operation." *Williams v. United States*, 399 U.S. 235, 242 (1970); *Griffin v. Illinois*, 351 U.S. 12 at page 17, n.11 (1956).

To the Clerk of the Court:

Please file the foregoing opinion.

United States Circuit Judge

VAN DUSEN, *Circuit Judge*, concurring:

While I join in the judgment of the court and in Judge Kalodner's opinion, I also agree with the district court majority opinion that the Procedures violate the Constitution for the reasons stated in that opinion. See *Doe v. Wohlgemuth*, 376 F. Supp. 173, 190-92 (W.D. Pa. 1974).

UNITED STATES COURT OF APPEALS
For the Third Circuit

Nos. 74-1726/74-1727

Ann Doe; Betty Doe, a minor, by her mother as representative, Mother B. Doe; [Cathy Doe; Donna Doe,] a minor, by her mother as representative, Mother D. Doe; Elaine Doe; Jane Doe, a minor, by her father as representative, Father J. Doe; Nancy Doe; Patricia Doe; Ruth Doe; Sylvia Doe; and Toni Doe, each individually and on behalf of all other women similarly situated,

Appellants in No. 74-1727

vs.

Helene Wohlgemuth, individually and as Secretary of the Department of Public Welfare, Commonwealth of Pennsylvania; Roger Cutt, individually and as Assistant Deputy Secretary for Medical Services, Commonwealth of Pennsylvania; Glenn Johnson, individually and as Chief of the Bureau of Medical Assistance, Commonwealth of Pennsylvania; Edward Kalberer, individually and as Executive Director of the Allegheny County Board of Assistance; and the Department of Public Welfare of the Commonwealth of Pennsylvania,

Appellants in No. 74-1726

(D.C. Civil Action No. 73-846)

On Appeal From the United States District Court
for the Western District of PennsylvaniaPresent: Kalodner, Van Dusen and Gibbons,
Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed May 28, 1974, be, and the same is hereby vacated, and the cause is remanded to the District Court with directions to enter an order enjoining enforcement of the Pennsylvania abortion Procedures in accordance with the opinion of this Court.

Attest:

THOMAS P. QUINN
Clerk

December 10, 1974

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

 Nos. 74-1726 and 74-1727

Ann Doe; Betty Doe, a minor, by her mother as representative, Mother B. Doe; [Cathy Doe; Donna Doe,] a minor, by her mother as representative, Mother D. Doe; Elaine Doe; Jane Doe, a minor, by her father as representative, Father J. Doe; Nancy Doe; Patricia Doe; Ruth Doe; Sylvia Doe; and Toni Doe, each individually and on behalf of all other women similarly situated,

Appellants in No. 74-1727

vs.

Frank S. Beal, individually and as Secretary of the Department of Public Welfare, Commonwealth of Pennsylvania; Roger Cutt, individually and as Assistant Deputy Secretary for Medical Services, Commonwealth of Pennsylvania; Glenn Johnson, individually and as Chief of the Bureau of Medical Assistance, Commonwealth of Pennsylvania; James A. Dorsey, Jr., individually and as Executive Director of the Allegheny County Board of Assistance; and the Department of Public Welfare of the Commonwealth of Pennsylvania

Appellants in No. 74-1726

(D.C. Civil No. 73-846)

Appeal From the United States District Court for the
Western District of Pennsylvania

 Argued October 24, 1974
Before Kalodner, Van Dusen and Gibbons, *Circuit Judges*

Reargued en banc May 8, 1975

Before Seitz, *Chief Judge*, and Kalodner, Van Dusen, Aldisert, Adams, Gibbons, Rosenn, Hunter and Garth, *Circuit Judges*.

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pital, Amicus Curiae

OPINION OF THE COURT
(Filed July 21, 1975)VAN DUSEN, *Circuit Judge*.

Before us are appeals both by plaintiffs and by the defendants from an order of a three-judge district court entered May 28, 1974, pursuant to an opinion which was filed by the district court on May 3, 1974. *Doe v. Wohlgemuth*, 376 F. Supp. 173 (W. D. Pa. 1974).¹ The case was argued before a panel of this court on October 24, 1974. The panel's opinion and judgment were filed on December 10, 1974. On December 24, 1974, the plaintiffs (appellees and cross-appellants) petitioned the court to rehear the case en banc. On January 31, 1975, we vacated the panel's December 10, 1974, judgment and ordered the case to be reheard en banc. The case was reargued en banc on May 8, 1975.

I. BACKGROUND

The facts appear in the district court's opinion. *Doe v. Wohlgemuth*, *supra* at 175-78. Briefly stated, the plaintiffs are women who are eligible for benefits under

¹ The plaintiffs sought both injunctive and declaratory relief. The district court granted a declaratory judgment for plaintiffs, but denied injunctive relief. Since the plaintiffs have not appealed the district court's denial of injunctive relief, this court has appellate jurisdiction. *Mitchell v. Donovan*, 398 U.S. 427 (1970); 28 U.S.C. §§1253, 1291. The caption was changed to *Doe v. Beal*, pursuant to F. R. Civ. P. 25(a)(1), after the appeal had been docketed in this court.

the Pennsylvania Medical Assistance Program (PMAP).² The defendants are "the Pennsylvania Department of Public Welfare (Department) and certain of its Officers and/or Administrative Representatives." *Id.* at 175. The plaintiffs challenge certain procedural requirements (hereinafter referred to as "procedures" or "regulations") which the Department has adopted to restrict PMAP payments for abortions.³ The district court found that, under these procedures, abortions would only be performed under PMAP in the following situations:

² See note 16 below for further description of the named plaintiffs. The district court declined to certify the plaintiffs as representatives of a class. *Doe v. Wohlgemuth*, *supra* at 181-82. The plaintiffs have not appealed the refusal to grant them class-action status.

³ After the district court's order was entered in the case before us, the Commonwealth of Pennsylvania enacted an "Abortion Control Act," Act No. 209, Sess. of 1974, 35 P.S. §§6601 *et seq.* (Purdon's Pa. Legis. Serv. No. 4), effective date October 10, 1974. Like the regulations before us, but through rather different language, §7 of The Abortion Control Act restricted state subsidy of elective abortions. The enforcement of §7, together with certain other provisions of the same Act, was preliminarily enjoined by a three-judge district court in the Eastern District of Pennsylvania on October 10, 1974. *Planned Parenthood Ass'n of Southeastern Pa., Inc. v. Fitzpatrick*, Civ. No. 74-2440 (E.D. Pa., Oct. 10, 1974).

At oral argument, we asked counsel for the Commonwealth whether the Abortion Control Act had superseded the regulations at issue in this suit. He represented that the Act had not, and that the Commonwealth intended to enforce the regulations independently of the fate of the Abortion Control Act. For this reason, we have concluded that this suit has not been mooted by passage of the Abortion Control Act. *Cf. Abele v. Markle*, 369 F. Supp. 807, 809 (D. Conn. 1973).

"1. There is documented medical evidence that continuance of the pregnancy may threaten the health or life of the mother;

2. There is documented medical evidence that the infant may be born with incapacitating physical deformity or mental deficiency; or

3. There is documented medical evidence that a continuance of a pregnancy resulting from legally established statutory or forcible rape or incest, may constitute a threat to the mental or physical health of a patient;

4. Two other physicians chosen because of their recognized professional competency have examined the patient and have concurred in writing; and

5. The procedure is performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals.' "

Id. at 175. See also *id.* at 175 n.1.⁴ In effect, these requirements define a compensable "therapeutic" abortion, and exclude payment for non-therapeutic, or "elective," abortions. The district court found that PMAP also covers the costs of prenatal care, childbirth, and post-partum treatment when the woman chooses to bear the child. *Id.* at 187.

The plaintiffs attack the Department's regulations both on the statutory ground that they are inconsistent

⁴ 62 P.S. §403 (1968) empowers the Department to establish "regulations, rules, and standards" as to the eligibility for assistance.

with Title XIX (commonly called "Medicaid") of the Social Security Act (hereinafter sometimes referred to as "the Act"), 42 U. S. C. A. §§1396, *et seq.* (1974),⁵ and also on the constitutional ground that they are inconsistent with Equal Protection Clause of the Fourteenth Amendment. In *Hagans v. Lavine*, 415 U.S. 528 (1974), the Supreme Court reversed the dismissal of a suit which challenged certain New York regulations under the Aid to Families with Dependent Children (AFDC) provisions of the Social Security Act, 42 U. S. C. A. §§601, *et seq.* (1974). Like Medicaid, AFDC is a voluntary participation program. See *Hagans v. Lavine*, *supra* at 530 n.1. Like the plaintiffs in the case now before us, the plaintiffs in *Hagans v. Lavine* challenged the New York regulations both on the ground that they were inconsistent with the Act and also on the ground that they violated the Equal Protection Clause of the Constitution. *Id.* at 530-31. The Court held that the constitutional claim was sufficient to confer jurisdiction on the district court under 28 U. S. C. §1343(3),⁶ but required the district court on remand to

⁵ Where code sections are referred to in this opinion without accompanying title references, "42 U. S. C. A. § (1974)" will be implicit.

⁶ The defendants in the case before us do not deny that the plaintiffs' constitutional arguments are sufficiently meritorious to confer jurisdiction on the district court under §1343(3). In view of the federal lower court decisions holding unconstitutional regulations similar to the Pennsylvania procedures now before this court, the constitutional "claim . . . [is] of sufficient substance to support federal jurisdiction [under 28 U. S. C. §1343(3)]." *Hagans v. Lavine*, *supra* at 536. See, *e. g.*, *Wulff v. Singleton*, 508 F. 2d 1211 (8th Cir. 1974); *Doe v. Westby*, 383 F. Supp. 1143 (D. S. D. 1974), and cases cited therein at 1145, *vacated and re-*

consider the statutory claim first as a matter of pendant jurisdiction. *Hagans v. Lavine*, *supra*, at 536, 539-43. The Supreme Court has recently made it clear that in the Title XIX setting it also desires the statutory claim to be carefully considered before constitutional questions are reached. In *Westby v. Doe*, 43 U. S. L. W. 3499 (U. S., Mar. 17, 1975), vacating *Doe v. Westby*, 383 F. Supp. 1143 (D. S. D. 1974), a policy of the Social Services Department of the State of South Dakota, which limited payment under Title XIX for abortions, was under review. The district court had reached the question of the policy's constitutionality without any consideration of the policy's consistency with Title XIX, and the Supreme Court summarily vacated and remanded for reconsideration in the light of *Hagans v. Lavine*.⁷

In the case before us, the district court considered the statutory claim, but decided that the Pennsylvania procedures were consistent with the Social Security Act. See *Doe v. Wohlgemuth*, *supra* at 182-86. Turning to the allegations of unconstitutionality, the court declared the

manded for further consideration in light of *Hagans v. Lavine*, *supra*, 43 U. S. L. W. 3499 (U. S., Mar. 17, 1975).

⁷ The March 16, 1975, order of the Supreme Court (No. 74-684) reads, *inter alia*, as follows: ..

"The judgment is vacated and the case is remanded to the United States District Court for the District of South Dakota for further consideration in light of *Hagans v. Lavine*, 415 U.S. 528, 543-545 (1974)."

In *Doe v. Westby*, the district court's failure to address the statutory question may be explained by the parties' failure to raise it. See *Doe v. Westby*, *supra* at 1144.

procedures to be in violation of the Equal Protection Clause. See *id.* at 186-92⁸.

Both arguments are renewed in this appeal. Because we believe that the principle of *Hagans v. Lavine* applies to the courts of appeals as well as to the district courts, we will consider first whether the Pennsylvania procedures are consistent with the Social Security Act. See *Alma Motor Co., v. Timkin-Detroit Axle Co.*, 329 U.S. 129, 136-37 (1947); *United States v. Schiavo*, 504 F. 2d 1, 6-7 & n.11 (3d Cir. 1974).

II. SUPREME COURT PRECEDENT ON THE SCOPE OF STATE PREROGATIVE UNDER THE SOCIAL SECURITY ACT

The district court reasoned that the Social Security Act was designed to give the states great latitude in establishing eligibility for, and levels of, benefits. *Doe v. Wohlgemuth*, *supra* at 184-86. The court relied principally on *Dandridge v. Williams*, 397 U.S. 471 (1970), in which the Supreme Court held that the Social Security Act allowed the states to place a ceiling on the amount of benefits available to recipients of AFDC. See also *New York Dept. of Social Services v. Dublino*, 413 U.S. 405 (1973) (a work incentive program added to the AFDC provisions of the Act does not pre-empt state work incentive programs); *Jefferson v. Hackney*, 406 U.S. 535 (1972) (Texas' method of computation of AFDC benefits held consistent with the Act).

⁸ Circuit Judge Weis dissented. 376 F. Supp. at 192.

The Supreme Court has recognized an important qualification to the *Dandridge v. Williams* principle. In *King v. Smith*, 392 U.S. 309 (1968), the Court held invalid Alabama regulations which prevented AFDC benefits from passing to the children of women cohabiting out of wedlock. The Court found the regulations to be inconsistent with congressional policy regarding AFDC recipients. Similarly, in *Rosado v. Wyman*, 397 U.S. 397 (1970), the Court held invalid a New York law which lowered the "standard of need" for AFDC benefits, finding the law to be inconsistent with what the Court "fathom[ed] to be Congressional purpose" in enacting §402(a)(23) of the Social Security Act, 42 U. S. C. A. §602(a)(23) (1974). 397 U.S. at 414-15. *King* and *Rosado* demonstrate that, although the AFDC program is a "scheme of cooperative federalism," *King*, *supra* at 316, it is not a scheme of unlimited state discretion. Instead, Congress defined an area of state prerogative, the boundaries of which are defined by the congressional policies—both explicit and implicit⁹—found in the Social Security Act. The *King v. Smith* principle was reaffirmed by an eight-Justice majority in *Van Lare v. Hurley*, 43 U. S. L. W.

⁹ In *Rosado*, the Court struck down the New York legislation, even though no express language in §402(a)(23) required that result:

"These conclusions, if not compelled by the words of the statute or manifested by legislative history, represent the natural blend of the basic axiom—that courts should construe all legislative enactments to give them some meaning—with the compromise origins of §402(a)(23), set forth above." *Rosado*, *supra* at 415. See also *King v. Smith*, *supra* at 332 (relying on "[t]he pattern of this legislation," and "[t]he underlying policy and consistency in statutory interpretation").

4592 (U.S., May 19, 1975) (finding New York's "lodger" regulations inconsistent with the Social Security Act). See also *Townsend v. Swank*, 404 U.S. 282 (1971); *Lewis v. Martin*, 397 U.S. 552 (1970).

III. TITLE XIX AS A "SCHEME OF COOPERATIVE FEDERALISM"

A. Areas of state discretion

Both parties agree with the district court that Title XIX, like AFDC, is a system of "cooperative federalism." *Doe v. Wohlgemuth*, *supra* at 184. The congressional desire to give the states considerable latitude in the administration of Title XIX is apparent throughout the statute. Funds are appropriated "[f]or the purpose of enabling each state, as far as practicable under the conditions in such State," to furnish medical assistance and other services. 42 U. S. C. A. §1396 (1974) (emphasis added). The states are free to choose whether they will participate at all; a participating state's program can cover only the "categorically needy," §1396a(a)(10); 45 C. F. R. 249.10(a)(1) (Rev. Ed., Oct. 1, 1973); or it can be extended to include the "medically needy" as well. Section 1396a(a)(10)(C); 45 C. F. R. §249.10(a)(1).¹⁰

¹⁰ The phrases "categorically needy," referring to categories of recipients described in §1396a(a)(10)(A), and "medically needy," referring to recipients described in §1396a(a)(10)(C), appear in the Regulations. 45 C. F. R. §249.10(a)(1) (Rev. ed., Oct. 1, 1973). The categorically needy are persons receiving aid or assistance under Titles I, X, XVI, Part A of Title IV, and persons receiving supplemental income benefits under Title XVI. §1396a(a)(10)(A). The medically needy are persons who are not

If a state extends coverage to the medically needy, it can either give the types of care and services listed in clauses (1) through (5) of §1396d(a) or give any seven of the types of care and services described in clauses (1) through

described in §1396a(a)(10)(A) "and who do not meet the income and resources requirements of the appropriate State plan, or the supplemental security income program under subchapter XVI of this chapter, as the case may be, as determined in accordance with standards prescribed by the Secretary—(i) for making medical assistance available to all individuals . . . who have insufficient income and resources to meet the costs of necessary medical and remedial care and service. . . ." §1396a(a)(10)(C).

Pennsylvania provides services to the "medically needy." 62 P.S. §441.1 reads as follows:

"The following persons shall be eligible for medical assistance:

"(1) Persons who receive or are eligible to receive cash assistance grants under this article;

"(2) Persons who meet the eligibility requirements of this article for cash assistance grants except for citizenship durational residence and any eligibility condition or other requirement for cash assistance which is prohibited under Title XIX of the Federal Social Security Act; and

"(3) The medically needy."

This last phrase is not otherwise defined, except by 62 P.S. §442.1:

"A person shall be considered medically needy if he:

"(1) Resides in Pennsylvania, regardless of the duration of his residence or his absence therefrom; and

"(2) Meets the standards of financial eligibility established by the department with the approval of the Governor. In establishing these standards, the department shall take into account (i) the funds certified by the Budget Secretary as available for medical assistance for the medically needy; (ii) pertinent Federal legislation and regulations; and (iii) the cost of living."

(16) of §1396d(a).¹¹ Section 1396a(a)(13)(C). The statute literally abounds with other options which are open to the participating states, all of which should help to tailor the state's program to the needs and conditions in that state, as contemplated in the appropriations section quoted above.

B. *Explicit statutory limitations on state discretion*

The story does not end with the litany of state discretion in A above. Many other provisions of the statute are designed to channel the state's program in directions which are consistent with the basic congressional objective of furnishing "medical assistance on behalf of families . . . whose income and resources are insufficient to meet the costs of necessary medical services." §1396.

1. Required services

Although the states were given a choice of services to provide to the medically needy, Congress requires the participating states to provide services (1) through (5) in §1396d(a) to the categorically needy. §1396a(a)(13)(B). Those services are the following:

"(1) Inpatient hospital services; (2) outpatient hospital services; (3) other laboratory and X-ray services; (4) skilled nursing facility services, screening and diagnosis of children, family planning services and supplies furnished to individuals of child bearing age; and (5) physicians' services furnished

¹¹ PMAP extends coverage to the medically needy, giving them services (1) through (5), the same care and services as it is required to give the categorically needy. *Doe v. Wohlgemuth*, *supra* at 182-83.

by a physician whether in the office, patient's home, hospital or elsewhere."

Doe v. Wohlgemuth, supra at 183.

2. Equality requirements

Another section of the Act requires the assistance made available to the categorically needy to be equitably distributed, and to be equal to the assistance made available to the medically needy:

"(a) A State plan for medical assistance must—

. . .

(10) provide—

(A) for making medical assistance available to all individuals receiving aid or assistance under any plan of the State approved under subchapter I, X, XIV, or XVI, or part A of subchapter IV of this chapter, or with respect to whom supplemental security income benefits are being paid under subchapter XVI of this chapter;

(B) that the medical assistance made available to any individual described in clause (A)—

(i) *shall not be less in amount, duration, or scope* than the medical assistance made available to any other such individual, and

(ii) *shall not be less in amount, duration, or scope* than the medical assistance made available to individuals not described in clause A; and

(C) if medical assistance is included for any group of individuals who are not described in clause

(A) and who do not meet the income and resources requirements of the appropriate State plan, or the supplemental security income program under subchapter XVI of this chapter, as the case may be, as determined in accordance with standards prescribed by the Secretary—

(i) for making medical assistance available to all individuals who would, except for income and resources, be eligible for aid or assistance under any such State plan or to have paid with respect to them supplemental security income benefits under subchapter XVI of this chapter, and who have insufficient (as determined in accordance with comparable standards) income and resources to meet the costs of necessary medical and remedial care and services, and

(ii) that the medical assistance made available to all individuals not described in clause (A) *shall be equal in amount, duration, and scope; . . .*"

Section 1396a(a)(10) (emphasis added).

C. General limitations on state discretion

1. Economy

In addition to the above express limitations on state prerogatives, the Act and its history include more general statements of purpose. These also are binding upon the participating states. Section 1396a(a)(17)(A) requires state-adopted standards for the receipt of benefits to be "consistent with the objectives of this subchapter [Title XIX]." See also *King v. Smith* and *Rosado v. Wyman, supra*.

Section 1396a (a) (30) requires the states to take such steps "as may be necessary to safeguard against unnecessary utilization of . . . care and services." This same emphasis upon payment for "necessary" medical services is reflected in §1396, the appropriations section, which states that the purpose of the Act is "to furnish (1) medical assistance on behalf of families . . . whose income and resources are insufficient to meet the costs of necessary medical services." Similar language appears in the definition in §1396a (a) (10) (C) (i) of the medically needy.¹² Limiting payments to those services which are "necessary" is also supported by recent amendments to Title XIX, which evidence a strong congressional interest in economy.¹³

¹² Two district courts agree with the conclusion that Congress intended to fund only "necessary" medical expenses. *Roe v. Ferguson*, slip opinion at 6-8, Civ. A. No. 74-315 (S. D. Ohio, Sept. 16, 1974), *rev'd*, 43 U. S. L. W. 2452 (6th Cir., No. 74-2195, Apr. 28, 1975); *Klein v. Nassau Cty. Med. Ctr.*, 347 F. Supp. 496, 499 (E.D.N.Y. 1972), *vacated and remanded* for further consideration in light of *Roe v. Wade* and *Doe v. Bolton*, 412 U.S. 925 (1973). A third district court was more troubled by the absence of "necessary" as a limitation on available medical services. *Roe v. Norton*, *supra* at 728-29. The *Roe v. Norton* court appears to have overlooked §1396a(a)(31), but it made the important observation that Medicare (Title XVIII) excludes payment for services "which are not reasonable and necessary for the diagnosis or treatment of illness or injury or to improve the functioning of a malformed body member." 42 U. S. C. A. §1395y(a)(1) (1974). *Roe v. Norton*, *supra* at 729. The court found the legislative history of Medicare and Medicaid to support "a common interpretation of both titles." *Id.*

¹³ See note 14 below.

2. Physicians' discretion

It is also apparent that Congress intended to place the primary authority for determining what treatment a particular recipient requires in the hands of the attending physician. The Senate Committee on Finance, which in 1965 reported favorably on the amendments to the Social Security Act that included the creation of Title XIX, wrote:

"3. General provisions relating to the basic and voluntary supplementary plans

"(a) Conditions and limitations on payment for services

"(1) Physicians' role

"The committee's bill provides that the physician is to be the key figure in determining utilization of health services—and provides that it is a physician who is to decide upon admission to a hospital, order tests, drugs and treatments, and determine the length of stay."

S. Rep. No. 404, 89th Cong., 1st Sess., 1965 U. S. Code Cong. & Admin. News 1943, 1986. Although these remarks referred to the amendments to Medicare (Title XVIII), Congress understood Medicaid (Title XIX) as an expansion of the Medicare concept.

The same Committee wrote:

"The committee bill is designed to liberalize the Federal law under which States operate their medical assistance programs so as to make medical services for the needy more generally available. To accom-

plish this objective, the committee bill would establish, effective January 1, 1966, a new title in the Social Security Act—"Title XIX: Grants to the States for Medical Assistance Programs." "

Id. at 2014. Thus, in *Roe v. Norton*, 380 F. Supp. 726 (D. Conn. 1974), the court discerned "the basic philosophy of both the Medicare and Medicaid provisions, which emphasizes the wide discretion to be accorded physicians in treating their patients." *Id.* at 729.¹⁴

¹⁴ The original Act required participating states to move toward, and eventually to furnish, "comprehensive care and services to substantially all individuals who meet the plan's eligibility standards with respect to income and resources," Social Security Amendments of 1965, Title XIX, §1903(e), 79 Stat. 350. In response to the rapidly inflating cost of medical services, this section was repealed in 1972, Social Security Amendments of 1972, Title II, §230, 86 Stat. 1410, but Congress made clear that in repealing §1903(e) it did not mean to alter the essential goals of the Medicaid system:

"Your committee also concluded that there is no simple or single solution to the problems now existing in the health care field which adversely affect these programs. But your committee does believe that there are modifications which can and should be made in these programs—changes which, while perhaps not very significant taken singly, as a whole, show great promise for making significant advances in accomplishing the goal of making these programs more economical and more capable of carrying out their original purposes."

H. R. Rep. No. 92-231, 92nd Cong., 2d Sess., 1972 U. S. Code Cong. & Admin. News 4989, 4994. See Comment, Abortion on Demand in a Post-Wade Context: Must the State Pay the Bills?, 41 Fordham L. Rev. 921, 932 (1973). It is, therefore, proper to conclude that the original purpose of protecting the physician's discretion in treatment was not intended to be altered by the 1972 repeal of §1903(e). The 1972 amendments do, however, demonstrate a

We must conclude that although Title XIX involves a system of "cooperative federalism," the congressional hand has been rather heavy in circumscribing the area of state prerogative.

IV. THE PENNSYLVANIA REGULATIONS' CONSISTENCY WITH TITLE XIX

Pennsylvania argues that its abortion regulations pursue congressional objectives. The state relies on the congressional mandate, noted above, to provide only necessary services, arguing that its regulations restrict payments for abortions to those which are "necessary," excluding those which are "elective." The argument proves too much. It is undoubtedly true that at the time a woman chooses to have a non-therapeutic abortion there is a greater quantum of personal freedom than at the time she has a therapeutic abortion or goes into labor. But there is also greater freedom of choice involved when one decides to have a tooth cavity filled than when one is forced to have the tooth extracted after it has abscessed. The state could not require Title XIX beneficiaries to await the abscess and undergo the extraction¹⁵ without damaging the broad purposes of Title XIX. And it is inconsistent with §1396a(a)(10)(B) and (C), which requires equality among beneficiaries, to force pregnant women to use the least voluntary method of treatment, while not imposing

congressional intent that the Medicaid funds be used in the most economical manner possible.

¹⁵ We make this argument for illustrative purposes only. Although dental services may be provided under Medicaid, §1396d(a)(10), Pennsylvania does not do so. See note 11, *supra*.

a similar requirement on other persons who qualify for aid.

The plaintiffs, on the other hand, place their reliance on the sections of the statute which require Pennsylvania to furnish them physicians' services, inpatient hospital services, outpatient services, and family planning services.¹⁶ Because Pennsylvania has chosen to extend coverage to the medically needy, and has chosen not to exercise its option under §1396a(a)(13)(C)(ii) subsection (13)(C)(i) requires Pennsylvania to extend the services listed in the text to those plaintiffs who are on Public Assistance. For this reason, the plaintiffs are correct in arguing that the state is required to furnish all of them—both those who are categorically needy and those who are medically needy—the listed services.

In both the statute and the regulations of the Department of Health, Education and Welfare, physicians' services are defined by reference to the legal practice of medi-

¹⁶ The district court opinion does not indicate whether all the plaintiffs are categorically needy. On reading the complaint and accompanying affidavits, we have found that six of the 11 named plaintiffs receive AFDC, while five receive "Public Assistance." AFDC is part A of Title IV; its recipients are therefore "categorically needy" and the state must provide them with services (1) through (5) of §1396d(a). §§1396a(a)(10)(A) and (13)(B). The services listed in the text are clauses (5), (1), (2), and 4(e), respectively, of §1396d(a). The plaintiffs receiving Public Assistance, on the other hand, are not categorically needy, but only medically needy. The state could, therefore, deny them Medicaid altogether or provide services other than those listed in the text. See pp. 8-10, *supra*. Nevertheless, Pennsylvania extends equal coverage to the medically and categorically needy. See note 11, *supra*.

cine under state law. See §1396d(a)(5), referring to §1395x(r)(1); 45 C. F. R. §249.10(b)(5) (Rev. ed., Oct. 1, 1973). Since *Roe v. Wade*, 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 179 (1973), required the states to legalize the practice of elective abortion during the first two trimesters of pregnancy, the plaintiffs argue that elective abortion is now included in the definition of "physicians' services," and is therefore required to be furnished to the plaintiffs by §1396a(a)(13)(B) and (C).¹⁷ Similar arguments are advanced under the rubrics of "inpatient hospital services," "outpatient hospital services," and "family planning services."

Again, the argument proves too much. Elective cosmetic surgery, for example, is within the licensed practice of medicine in most, if not all, states. If the plaintiffs were correct, the state would be required to pay for such procedures, at the expense, perhaps, of many pressing medical needs of the poor.¹⁸ While §1903(e) of the original Act may have required the eventual finding of such procedures,¹⁹ its repeal indicates that Congress has no present intention of funding every procedure which falls within the legal practice of medicine. The states are given broad discretion to tailor their programs to their particular needs, and are required to economize and to fund only necessary medical expenses.

¹⁷ See note 15, *supra*. A similar argument appears in Comment, *supra* note 14, at 937 n. 106.

¹⁸ New York's Medicaid program, for example, appears to exclude elective cosmetic surgery. See *Klein, supra* note 12, at 500. We have not been apprised whether Pennsylvania's does so or not.

¹⁹ See note 14, *supra*.

The problem for this court is to harmonize the various competing policies found in the Act and its history. A participating state should be able to adapt its program to its conditions and needs, and to limit the level of its Medicaid expenditures. This can be accomplished by giving the state broad discretion to define the medical conditions for which treatment is "necessary" within the meaning of the Act.²⁰ The proper treatment of such a condition, on the other hand, must be left to the judgment of the attending physician.²¹ See *Roe v. Norton*, *supra* at 729. Vesting such discretion in the physician is consistent with congressional objectives, see p. 13, *supra*; it is also a logical prerequisite to any program intended to bring valid medical assistance to the needy.^{21a} See §1396a(a)(19) (re-

²⁰ This court is not the first one to relate "necessary" to the conditions to be treated, rather than to the choice of treatment. See *Roe v. Norton*, *supra* at 729, *Klein v. Nassau Cty. Med. Ctr.*, *supra* note 12, at 500.

²¹ The range of the doctor's discretion is in turn defined by each state's definition of the legal practice of medicine. See pp. 16-17, *supra*.

^{21a} In the Amicus Curiae Memorandum of the United States, filed in *New York, etc. v. Klein, et al.*, 412 U.S. 925 (1973), and relied on extensively in Judge Kalodner's dissent, this language appears at pages 7-8:

"But the state appellants have properly refused to intrude on the physician's judgment; they are completely 'guided by the ruling of the women's physician as to whether an abortion is medically indicated' (J.S. 11). Thus the state appellants, in administering the New York Medicaid program, simply treat abortions in the same manner as other medical services: they defer to the medical judgment of the attending physician. If in the judgment of the patient's physician a particular medical service—whether an abortion or an ap-

quiring states to safeguard "the best interest of the recipients").

pendectomy—is advisable to preserve health, that medical service is covered by the New York medicaid program.

"The court below misunderstood the crucial role played by the woman's physician in the New York scheme. . . . [T]he district court simply assumed that the abortions sought were not medically indicated (J.S. App. A, 4a), but this was a medical judgment which the court was not in a position to make. Contrary to the court's assumption, it is possible that an attending physician would have concluded that an abortion was medically indicated with respect to one or more of the appellees.

"At bottom, therefore, appellees' argument apparently is that the Social Security Act requires reimbursement of the costs of all medically feasible abortions performed merely upon the demand of pregnant women. We see no statutory basis for this contention. An abortion is a serious medical matter which requires an exercise of medical judgment. A state need not provide medical assistance with respect to other medical services—such as, for example, a tonsillectomy—merely upon the patient's own request, and there is no apparent reason why abortions should be treated differently." The Memorandum also quoted from *Doe v. Bolton*, *supra*, and *Roe v. Wade*, *supra*, as follows at pp. 8-9:

"Our conclusion is reinforced by this court's recent statements concerning the nature of the medical judgment here in question and the importance of that judgment to the expectant mother. In *Doe v. Bolton*, No. 70-40, decided January 22, 1973, slip op. at 11-12, the Court stated:

"• • • the medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient. All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment. And it is room that operates for the benefit, not the disadvantage, of the pregnant woman."

Of course, some regulation of the methods of treatment is reasonable, and unavoidable. But the state should be required to show that, on balance, the policies of Title XIX support the regulations in question. See *Doe v. Rose*, 499 F. 2d 1112, 1114 (10th Cir. 1974) ("the respective states are empowered to impose reasonable standards for carrying out the objectives of the federal program") (em-

"And in *Roe v. Wade*, No. 70-18, decided January 22, 1973, slip op. at 49, the Court emphasized the critical importance of the attending physician's role by concluding that, as a constitutional matter, during the first trimester of pregnancy 'the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.' We agree that the role of the attending physician is and should be an important one, and we therefore believe that the state appellants have acted reasonably in preserving that role under the medicaid program."

If the plaintiff's physicians do not approve their desired abortions, such abortions will not qualify under Title XIX. The procedures, with their requirements for examination by two additional physicians, as well as the physician of each plaintiff, etc., are clearly not supported by the above Memorandum.

Also, the M. S. A. of HEW policy, set forth in note 5 at 376 F. Supp. 179 and at 1 CCH Medicare and Medicaid Guide ¶14,511, also relied on in Judge Kalodner's dissent (see, for example, note 18 at page 16), does not support such procedures. It is noted that ¶14,515 of 1 CCH Medicare and Medicaid Guide, entitled "Equality of Medical Care," contains this wording of CCH, *inter alia*:

"The regulations (Reg. §249.10(a)(6), ¶21,610) provide that the medical and remedial care and services made available to any categorically needy individual included under the plan will not be less in amount, duration, or scope than those made available to other individuals included under the program. . . ."

phasis added). Under §1396a(a)(19), for example, the state might require some procedures to be performed in hospitals, to protect the medical interests of the recipients. Or, pursuant to the congressional interest in economization, the state might require doctors to prescribe generic drugs rather than brand names, provided, of course, that this would, in the particular instance, be consistent with sound medical practice. Gratuitous interference with medical decisions by doctors, on the other hand, would create a system of medical obstruction, rather than of medical assistance.

Applying the above analysis to the Pennsylvania regulations before us, we find them to be inconsistent with the Act. Since the Commonwealth of Pennsylvania pays for full-term deliveries and also for therapeutic abortions, it is plain that the state has determined, in its discretion, that pregnancy is a condition for which medical treatment is "necessary" within the meaning of Title XIX. The next question is whether some justification can be found in the statute for preventing an attending physician from choosing non-therapeutic abortion as the method for treating a pregnancy.²² We can find none. Economy will not do, since in most cases non-therapeutic abortion is the cheapest method of treatment. See *Doe v. Rose*, *supra* at 1116-17, citing *Klein v. Nassau Cty. Med. Ctr.*, *supra* note 12; *Doe v. Wohlgenuth*, *supra* at 187. Nor will protection of the recipient's health, under §1396a(a)(19) suffice;

²² As stated by the Supreme Court in *Doe v. Bolton*, *supra*, at 192:

"Whether . . . 'an abortion is necessary' is a professional judgment that the . . . physician will be called upon to make routinely."

the state itself admitted at oral argument that non-therapeutic abortion is the least dangerous alternative for the pregnant woman, at least during the first trimester. See *Roe v. Wade*, *supra* at 163. Not only are the state's abortion regulations not justified by any statutory policy, but they also run directly counter to §1396a(a)(10)(B) and (C), since the "least voluntary method of treatment" requirement which the regulations impose on pregnant women is imposed on no other class of recipient. We therefore conclude that once the state has decided to finance full-term delivery and therapeutic abortion as methods for the treatment of pregnancy, it cannot decline to finance non-therapeutic abortions without violating the requirements of Title XIX. Since the decisions of the Supreme Court have forced the states to include elective abortion in the legal practice of medicine through the second trimester of pregnancy,²³ we also hold that the statute requires Pennsylvania to fund abortions through the end of the second trimester.²⁴

V. CONTRARY ARGUMENTS REJECTED

In reaching the above conclusion, we are not unmindful that other courts have found state provisions like Pennsylvania's to be consistent with the statutory scheme. In

²³ See *Roe v. Wade*, *supra* at 164; see also note 21, *supra*.

²⁴ Because the medical risk to a pregnant woman is somewhat enhanced during the second trimester, see *Roe v. Wade*, *supra* at 163, the state might require second trimester abortions funded by PMAP to be performed under physical conditions—*e.g.*, in a hospital—which protect the health of the aborting woman. §1396a(a)(19). See also *Roe v. Wade*, *supra* at 163; *Doe v. Bolton*, *supra* at 194-95.

Roe v. Ferguson, 43 U.S. L.W. 2452 (6th Cir. No. 74-2195, Apr. 28, 1975), the Sixth Circuit reversed a district court's holding that Title XIX requires state funding for elective abortions. The court wrote:

"There is no indication that Congress intended to require the furnishing of abortion services not required for the preservation of the health of the woman at a time when the performance of such abortions was illegal in most jurisdictions. In view of the disfavor shown toward abortions in other legislation, we are reluctant to infer that Congress intended to include required coverage for such controversial services without even mentioning the subject. When Congress passed the Family Planning Services and Research Act of 1970, 42 U.S.C. §§300a et seq., providing funds to states opting to participate in creating comprehensive programs of family planning services, abortion was specifically excluded as a means of family planning to be recognized under the Act. 42 U.S.C. §300a-6.

"In establishing the Legal Services Corporation system, Congress again provided that no funds of the Corporation could be used for legal assistance for those seeking to procure a non-therapeutic abortion. 42 U.S.C. §2996f(b)(8)." *Id.*

See also *Doe v. Rose*, *supra* at 1114-15 ("prefer[ring]" to decide the case on constitutional grounds in light of the Act's silence on the abortion question); *Doe v. Wohlgemuth*, *supra*. We find none of these arguments to be persuasive. It is impossible to believe that in enacting Title XIX Congress intended to freeze the medical

services available to recipients at those which were legal in 1965. Congress surely intended Medicaid to pay for drugs not legally marketable under the FDA's regulations in 1965 which are subsequently found to be marketable. We can see no reason why the same analysis should not apply to the Supreme Court's legalization of elective abortion in 1973. The inference which the Sixth Circuit drew from legislation in which Congress prohibited expenditure for non-therapeutic abortions also seems unwarranted. Congress could have proscribed payment for elective abortions when it passed the Family Planning Services and Research Act of 1970, or in 1972 when it amended Title XIX, but it did not do so. See Comment, *supra* note 14, at 933 n.80. Furthermore, abortions are hardly a desirable method of family planning; this consideration may explain the provisions of the Family Planning Services and Research Act relied upon by the Sixth Circuit.

VI. CONCLUSION AND DISTRICT COURT ACTION ON REMAND

For the foregoing reasons, the plaintiffs are entitled to a declaratory judgment declaring that the Pennsylvania regulations are inconsistent with Title XIX of the Social Security Act, 42 U.S.C.A. §1396 *et seq.*, during the first and second trimesters of pregnancy.

In *Hagans v. Lavine*, *supra* at 543-44, the Supreme Court pointed out that a single district judge can grant both declaratory and injunctive relief on statutory grounds in a case such as this, using this language (415 U.S. 543):

"Given a constitutional question over which the District Court had jurisdiction, it also had jurisdiction

over the 'statutory' claim. See *supra*, at 536. The latter was to be decided first and the former not reached if the statutory claim was dispositive. [Citing cases.] The constitutional claim could be adjudicated only by a three-judge court, but the statutory claim was within the jurisdiction of a single district judge. [Citing cases.] Thus, the District Judge sitting alone, moved directly to the statutory claim. His decision was appealed to the Court of Appeals, although had a three-judge court been convened, an injunction issued, and the statutory ground alone decided, the appeal would be only to this Court under 28 U.S.C. §1253."

The court went on to state at 543-45:

"The procedure followed by the District Court—initial determination of substantiality and then adjudication of the 'statutory' claim without convening a three-judge court— . . . accurately reflects the recent evolution of three-judge-court jurisprudence

. . . .

"It is true that the constitutional claim would warrant convening a three-judge court and that if a single judge rejects the statutory claim, a three-judge court must be called to consider the constitutional issue. Nevertheless, the coincidence of a constitutional and statutory claim should not automatically require a single-judge district court to defer to a three-judge panel, which, in view of what we have said in *Rosado v. Wyman*, *supra*, could then merely pass the statutory claim back to the single judge. [Citing cases.] 'In fact, it would be grossly ineffi-

cient to send a three-judge court a claim which will only be sent immediately back. This inefficiency is especially apparent if the single judge's decision resolves the case, for there is then no need to convene the three-judge court.' [Citing case.] Section 2281 does not forbid this practice, and we are not inclined to read that statute 'in isolation with mutilating literalness'"

We have quoted the foregoing because we hold at this time that the majority opinion in *Murrow v. Clifford*, 502 F. 2d 1066 (3d Cir. 1974), will not be followed insofar as it is inconsistent with (a) part II of *Hagans v. Lavine, supra*²⁵ and (b) this opinion.

Because of our power to modify the May 28, 1974, Supplemental Order of the district court under 28 U.S.C. §2106, we will direct that it be modified to read as follows, and the case will be remanded to the district court so that the three-judge court can be dissolved, the assigned district judge to take any further action required consistent with this opinion:

" . . . IT IS HEREBY ADJUDGED AND DECREED that the Regulations and Procedures of the Department of Public Welfare of the Commonwealth of Pennsylvania, as they apply to reimbursement for abortions performed within the first two trimesters of pregnancy, are invalid because they are inconsistent with Title XIX of the Social Security Act, 42 U.S.C. §1396, *et seq.* In all other respects, Plaintiffs' Requests for Declaratory Judgment are denied."

²⁵ Cf. *Philbrook v. Glodgett*, 43 U. S. L. W. 4702, note 8 at 4704 (U.S., No. 73-1820, June 9, 1975).

Costs shall be taxed against defendant-appellants at No. 74-1726.

To the Clerk:

Please file the foregoing opinion.

Circuit Judge

KALODNER, Circuit Judge, dissenting.

The majority holds that "the plaintiffs are entitled to a declaratory judgment declaring that *the Pennsylvania regulations are inconsistent with Title XIX of the Social Security Act*, 42 U.S.C.A. §1396 *et seq.*; during the first and second trimesters of pregnancy," and further concludes that "it is unnecessary to reach the plaintiffs' constitutional arguments." (emphasis supplied).

I dissent from the majority's holding that "the Pennsylvania regulations are inconsistent with the Social Security Act." I disagree, too, with its conclusion that "it is unnecessary to reach the plaintiffs' constitutional arguments."

I would affirm the holding of the three-judge court that the "*Pennsylvania Regulations do not conflict with Title XIX of the Social Security Act*,"¹ (emphasis supplied).

I would also reverse the holding of the court below that "the Regulations and/or Procedures of the Pennsyl-

¹ 376 F. Supp. 173, 186 (W.D. Pa. 1974).

vania Medical Assistance Program are unconstitutional because they are in violation of the Equal Protection Clause since they create an unlawful distinction between individual women who choose to carry their pregnancies to birth, and indigent women who choose to terminate their pregnancies by abortion."²

I would, however, enjoin enforcement of the Regulations on the ground that they are being administered in violation of the Equal Protection Clause of the Fourteenth Amendment in that they are *not enforced* against welfare recipients who threaten suit when they are denied reimbursement for non-therapeutic abortions, and *enforced only* against those who do not threaten suit. It is settled that State administrative procedures which are *per se* valid and constitutional may nevertheless be enjoined when they are unconstitutionally applied.

The views expressed will be discussed *seriatim* as follows:

I. THE PENNSYLVANIA REGULATIONS' CONSISTENCY WITH TITLE XIX

This must be said in preface:

First, two other Circuit Courts which have spoken to the question have expressly refused to subscribe to the view now espoused by the majority. *Rose v. Ferguson*, 43 U.S.L.W. 2452 (6th Cir. April 28, 1975); *Doe v. Rose*, 499 F. 2d 1112 (10th Cir. 1974).

Second, the majority's holding of inconsistency is nourished only by a single district court decision, *Roe v. Norton*, 380 F. Supp. 726 (D. Conn. 1974).

² *Id.* at 191.

Third, our brother Weis, a member of the three-judge court below, specifically expressed his concurrence with its holding that the Regulations are not inconsistent with Title XIX, albeit he dissented from its holding that the Regulations are unconstitutional.³

Fourth, the specific question "[w]hether the Social Security Act requires a federally-funded state medicaid program to pay for abortions that are not medically indicated," was answered in the negative by the Solicitor General of the United States in a "Memorandum for the United States as Amicus Curiae."⁴ (emphasis supplied).

Fifth, The Medical Assistance Services Administration in the Social and Rehabilitation Service of the Department of Health, Education, and Welfare, which administers the Medicaid aspect of the Social Security Act, has made it clear in a statement on its "position" on abortion, that a state participating in the Medicaid program has the *option* of funding abortions, and, if it does, "the Federal Government shares the costs with the State."⁵

³ Judge Weis stated: "I also concur in the court's holding that the State regulations are not in conflict with the federal statute." 376 F. Supp. at 192 n.1.

⁴ The "Memorandum" was filed in *Commissioner of Social Service of New York et al. v. Klein and Nassau County Medical Center et al. v. Klein et al.*, 412 U.S. 925 (1973) (hereinafter cited as *Amicus Curiae Memorandum*). It recites that "[t]his memorandum is filed in response to the Court's invitation to the Solicitor General to file a memorandum expressing the views of the United States on the statutory issues." *Id.* at 1.

⁵ 1 CCH Medicare and Medicaid Guide ¶14,511; see too 41 Penna. Bulletin 2207 n.4 (Sept. 29, 1973) (Opinion Letter, dated Aug. 6, 1973, from Israel Paekel, Atty. Gen. of Penna., to Helene Wohlgemuth, Sec'y of Penna. Dept. of Public Welfare, on the

The points outlined will be more fully developed after the following discussion of the critical provisions of Title XIX and the Regulations.

Title XIX of the Social Security Act, popularly known as Medicaid, and the federal regulations promulgated thereunder, establish a comprehensive system of health care for the needy. In the spirit of "cooperative federalism," Congress annually appropriates funds to enable each state, "as far as practicable under the conditions in such state, to furnish . . . medical assistance" to designated families and individuals "whose income and resources are insufficient to meet the costs of *necessary medical services*." 42 U.S.C. §1396. (emphasis supplied).

A state is not required to participate in the Medicaid Program, but if it chooses to become a participant, it must submit a plan for medical assistance to the Department of Health, Education, and Welfare ("HEW") for approval, which is conditioned upon the plan comporting with the provisions of Title XIX. *See* 42 U.S.C. §§1396, 1396a (b). Thereafter, operation of the program is under state direction with continuing eligibility for federal grants subject to the state's compliance with the originally approved plan and federal regulations. *See* 42 U.S.C. §1396c; 45 C.F.R. §§246-280.

As dictated by the federal statute and regulations, a state's Medicaid program *must* provide medical assistance⁶

Effect of United States Supreme Court Decisions on Department of Public Welfare Medical Assistance Regulations on Abortions: noted in the opinion of the district court. 376 F. Supp. at 178 n.5.

⁶ "Medical assistance" is functionally defined by the Social Security Act in terms of part or total payment for seventeen dif-

to the "categorically needy," as spelled out by the majority. See 42 U.S.C. §1396a(a)(10)(A).

A state *may* decide to limit coverage to the "categorically needy," or it *may* decide to include within the scope of its Medicaid program other groups or individuals in need of "necessary medical services."

A state whose medical assistance program extends beyond the "categorically needy," has the option of providing the five services made mandatory as to those in the "categorically needy" class, or selecting any seven of the services listed in clauses (1) through (16) of §1396d (a). See 42 U.S.C. §1396a(a)(13).

The five services made mandatory as to the "categorically needy" (included in Pennsylvania's Medicaid program) are:

“(1) inpatient hospital services (other than services in an institution for tuberculosis or mental diseases);

“(2) outpatient hospital services;

"(3) other laboratory and X-ray services:

"(4) (A) skilled nursing facility services (other than services in an institution for tuberculosis or mental diseases) for individuals 21 years of age or older (B) effective July 1, 1969, such early and periodic screening and diagnosis of individuals who are eligible under the plan and are under the age of 21 to ascertain their physical or mental defects, and

ferent types of services reimbursable under the Medicaid Program.
42 U.S.C. §1396d(a).

such health care, treatment, and other measures to correct or ameliorate defects and chronic conditions discovered thereby, as may be provided in regulations of the Secretary; and (C) family planning services and supplies furnished (directly or under arrangements with others) to individuals of child-bearing age (including minors who can be considered to be sexually active) who are eligible under the State plan and who desire such services and supplies;

"(5) physicians' services furnished by a physician . . . whether furnished in the office, the patient's home, a hospital, or a skilled nursing facility, or elsewhere," §1396d (a) .

A state is required to include in its Medicaid plan "reasonable standards . . . for determining eligibility for and the extent of medical assistance under the plan which . . . are consistent with the objectives of [Title XIX]. . . ." 42 U.S.C. §1396a (a) (17). A state may properly limit the coverage of its Medicaid program to the costs of "necessary medical services." A state plan for medical assistance *must* provide that a method of "utilization review" be established for each item of care or services listed in 42 U.S.C. §1396d (a) so as "to safeguard against unnecessary utilization of such care and services. . . ." 42 U.S.C. §1396a (a) (30) [sic*]; 45 C.F.R. §250.20 (a). The federal regulations specifically authorize "[a]ppropriate limits . . . placed on services based on such criteria as medical necessity or those contained in utilization or medical review procedures." 45 C.F.R. §249.10 (a) (5) (i).

* Citation used by Judge Kalodner appears to be incorrect and the correct citation should read §1396(a) (30).

Furthermore, any medical services made available to a "categorically needy" person must not be less in "amount, duration, or scope" than that provided other groups or individuals. Services made available to a group other than the "categorically needy" must be equal in "amount, duration, and scope" for all individuals within the group, 42 U.S.C. §1396a (a) (10), but may be less than or differ from those benefits provided the "categorically needy."⁷

In summary outline, Title XIX provides for a federal-state funded program which permits each state to decide whether it will participate and what services it will provide, and to whom, subject to the requirement that certain welfare recipients must be included and certain items of basic medical care must be furnished.⁸

The Pennsylvania Medical Assistance Program ("PMAP") was designed to comport with the requirements of Title XIX. It provides, *inter alia*, for reimbursement for medical services to the "categorically needy," and the "medically needy," affording to the latter the five services made mandatory as to the "categorically needy,"⁹ earlier here spelled out.

Regulations pertaining to the administration of PMAP provide for reimbursement of costs of an abortion *only* where "there is documented medical evidence," submitted by the attending physician and two other physicians, that "continuance of the pregnancy may threaten

⁷ See Stevens and Stevens, *Medicaid: Anatomy of a Dilemma*, 35 Law & Contemp. Prob. 348, 363 (1970) (hereinafter cited as Stevens).

⁸ 1 CCH Medicare and Medicaid Guide, ¶14,010.

⁹ *Id.* at ¶15,632; 62 P.S. §§432, 441.1.

the health or life of the mother," or, that "the infant may be born with incapacitating physical deformity or mental deficiency," or, that "a continuance of pregnancy resulting from legally established statutory or forcible rape or incest, may constitute a threat to the mental or physical health of a patient," and "the procedure is performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals."

The recited provisions of the Regulations, as the majority has well said, "in effect . . . define a compensable 'therapeutic' abortion, and exclude payment for non-therapeutic, or 'elective' abortions."

The plaintiff-welfare recipients contended below that the cited Regulations contravene Title XIX, because, in their view, *an abortion*, whether it be therapeutic or non-therapeutic, is a "necessary medical service" within the meaning of the Title and the purview of its categories of "physicians' services"; "inpatient and outpatient hospital services", and "family services."

In disposing of these contentions, the court below said:

*"Congress was silent with respect to specific authorization of medical assistance for abortions. Pennsylvania standards must be scrutinized without curtailment by Congressional action and the State Regulations and/or Procedures must be given great latitude in providing for the administration of the Program. We, therefore, feel compelled to find Pennsylvania's Regulations do not conflict with Title XIX of the Social Security Act."*¹⁰ (emphasis supplied)

¹⁰ 376 F. Supp. at 185-86.

The foregoing holding was prefaced by this significant statement:

"But, even if we assume, as do the Plaintiffs, that abortion payments are clearly authorized under Title XIX of the Social Security Act, nevertheless, Congress has given the States great latitude in establishing standards for the administration of the various plans, under the doctrine of a 'scheme of cooperative federalism.'"¹¹

The distilled essence of the holding below is that Title XIX does not, *per se*, require a Medicaid state to pay for a non-therapeutic abortion, and accordingly the Pennsylvania Regulations denying payment for such an abortion does not conflict with Title XIX.

The distilled essence of the majority's holding is that Title XIX, *per se*, requires a Medicaid state to pay for a non-therapeutic abortion "once the state had decided to finance full-term delivery, and therapeutic abortion as methods for the treatment of pregnancy."

The Achilles' heel of the majority's holding is its *non-sequitor* application of recent Supreme Court decisions,¹² in which no issue as to the sweep of Title XIX was involved, and the critical question presented related *only* to constitutional challenges to state statutes making performance of a non-therapeutic abortion a crime.

The majority's application of these Supreme Court decisions is manifested by its following statement:

¹¹ *Id.* at 184.

¹² *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973).

"Since the decisions of the Supreme Court have forced the states to include elective abortion in the legal practice of medicine through the second trimester of pregnancy, we also hold that the statute [Title XIX] requires Pennsylvania to fund abortions through the end of the second trimester." (emphasis supplied).

It need only be said on the score of the foregoing, that the 1973 Supreme Court decisions, which make legal a physician's performance of an elective abortion, cannot be utilized to construe the earlier enacted Title XIX¹³ as requiring a Medicaid state to pay the expenses of such an abortion, albeit these decisions are applicable to the presented issue of constitutionality of the Pennsylvania Regulations which has been avoided by the majority.

As earlier noted, two other circuits which have spoken to the Title XIX issue have subscribed to the holding of the court below and expressly refused to subscribe to the view espoused by the majority.

In *Doe v. Rose*, 499 F. 2d 1112 (10th Cir. 1974), constitutional and statutory challenges were presented to the Utah Department of Social Services' "informal policy" concerning abortions.

The "informal policy" provided that a pregnant woman was not entitled to an abortion at the expense of Utah's Medicaid program without prior approval as a "therapeutic abortion" by the Executive Director of the Department. The "informal policy" defined a "therapeutic abortion" as one necessary to save the life of the expectant

¹³ Title XIX was first enacted in 1965, and amended in 1972.

mother or to prevent serious and permanent impairment to her physical health, and none other.

The district court granted the plaintiffs' request for an injunction restraining enforcement of the "informal policy" on both statutory and constitutional grounds. The Tenth Circuit, on review, affirmed on the constitutional grounds only, declaring that it preferred to do so for these reasons:

"At the outset, so far as we are advised the applicable federal statutes regarding Medicaid make no mention, as such, of abortions. Hence, we lack specific guidance as to whether Congress intended that abortions be covered by Medicaid and, if so, more critically, *which* abortions were to be covered by medicaid benefits. . . .

"The implementing state statutes of Utah, as well as the latter's state plan, submitted to and approved by the federal authorities, also make no mention, as such, of abortions. Hence, this is not an instance where the administrative policy under attack is mandated by either state or federal statute. By the same token, *in our view there is nothing in either the federal or state statutes which specifically bars the policy here followed by Rose*. In this regard, we are mindful of the Supreme Court's preference for statutory, as opposed to constitutional, resolution of welfare controversies. See *Wyman v. Rothstein*, 398 U.S. 275, 90 S. Ct. 1582, 26 L. Ed. 2d 218 (1970). Nevertheless, in light of the applicable statutes' complete silence on the abortion question, we prefer to dispose of the present appeal on constitutional

grounds, rather than by any strained effort to show that the policy in question is, in effect, though not in so many words, prohibited by either federal or state statute. . . ." 499 F. 2d at 1114-1115. (emphasis supplied).

The Sixth Circuit, in *Roe v. Ferguson*, 43 U.S.L.W. 2452 (6th Cir. April 28, 1975), reversed the district court's holding that Title XIX was contravened by administrative rulings by the Auditor of the State of Ohio and an Ohio statute which prohibited reimbursement for elective abortions to state Medicaid recipients.

In doing so, the Court expressly declared its accord with *Doe v. Rose*, *supra*, and the holding of the court below in the instant case, on the Title XIX issue, in the following statement:

"We are in accord with the decisions which have found no conflict between state restrictions of Medicaid payments to elective abortions and the provisions of the Social Security Act. There is no indication that Congress intended to require the furnishing of abortion services not required for the preservation of the health of the woman at a time when the performance of such abortions was illegal in most jurisdictions. In view of the disfavor shown toward abortions in other legislation, we are reluctant to infer that Congress intended to include required coverage for such controversial services without even mentioning the subject. When Congress passed the Family Planning Services and Research Act of 1970, 42 U.S.C. §§300a et seq. providing funds to states opting to participate in creating comprehensive pro-

grams of family planning services, abortion was specifically excluded as a means of family planning to be recognized under the Act, 42 U.S.C. §300a-6.

"In establishing the Legal Services Corporation system, Congress again provided that no funds of the Corporation could be used for legal assistance for those seeking to procure a non-therapeutic abortion. 42 U.S.C. §2996f (b) (8) .

"In view of this evidence of the Congressional attitude toward abortion as a family planning technique or as an acceptable medical service in general, it is difficult to construe the silence of Congress in Title XIX as an endorsement of the view that non-therapeutic abortions are included in the 'necessary medical services' required to be furnished by a state participating in Medicaid. This is not to say that Congress may constitutionally exclude such abortion services from coverage in the Medicaid program. *In the absence of a legislative history indicating a contrary position, however, we cannot say that the statute itself prohibits such an exclusion.*" (emphasis supplied).¹⁴

As earlier stated, the majority's holding is nourished only by a single district court case—*Roe v. Norton*, *supra*.

¹⁴ It must be noted that the Court in *Roe* remanded the case for consideration of the constitutional issue by a three-judge court, and that the Tenth Circuit in *Doe v. Rose* ruled that the denial of benefits for a non-therapeutic abortion was unconstitutional, albeit, it reversed the district court's ruling there that the denial contravened Title XIX. The stated unconstitutionality ruling will be discussed later.

There, the narrow issue presented was whether Title XIX prohibited "federal reimbursement for the expenses of an [elective] abortion," and thus compelled a Medicaid state to deny reimbursement for such an abortion. The issue arose by reason of the adoption of a regulation by the Connecticut Welfare Department banning reimbursement for non-therapeutic abortions because of its belief that it was compelled to do so by Title XIX.¹⁵ The district court ruled that "Title XIX must be construed to permit payment for elective abortions." In doing so, the district court further held that the Title "must be construed . . . to prohibit state regulations that impair a woman's exercise of her right in consultation only with her physician to have an [elective] abortion."¹⁶

It must immediately be noted that the stated further holding is dictum under the prevailing circumstances.

Coming now to the majority's disregard of the views expressed by the Solicitor General of the United States, and the federal agency which administers the Medicaid program, on the score of the reach of Title XIX, in its holding that "the Pennsylvania Regulations are inconsistent with Title XIX":

As already stated, the Solicitor General in his Amicus Curiae Memorandum¹⁷ specifically opined that "the Social Security Act does not require a federally-funded state Medicaid program to pay for abortions that are not medically indicated," and, the federal agency which administers the Medicaid program, in a statement on its "position" on

¹⁵ 380 F. Supp. 726, 728 n.2.

¹⁶ *Id.* at 730.

¹⁷ See note 4, *supra*.

abortion,¹⁸ made it clear that a Medicaid state has the option of funding abortions, and if it does, "the federal Government shares the costs with the State."

A more recent statement made by the Social and Rehabilitation Service, under which the Medical Services Administration operates, further reflects the Government's view that Title XIX does not exclude non-therapeutic abortions.

The statement declares in relevant part that "under Title XIX, federal financial participation is available for any abortions for which the state welfare agency provides."¹⁹ (emphasis supplied).

¹⁸ The Medical Assistance Services Administration in the Social and Rehabilitation Service of the Department of Health, Education, and Welfare, which administers the Medicaid aspect of the Social Security Act, made the following response to an inquiry of the Attorney General of Pennsylvania anent federal sharing with a Medicaid state of abortion payments:

"The position taken by the Medical Services Administration on abortion is that the Social Security Act and the HEW Regulations provide for Federal matching of State expenditures for all kinds of medical care and services, including inpatient hospital services, outpatient hospital services, physician services, drugs, etc. If the State Medicaid program pays for these services, whether for abortion, or any other medical procedure, the Federal Government shares the costs with the State." (emphasis supplied). See too, note 5, *supra*.

¹⁹ *Roe v. Norton*, 380 F. Supp. 726, 730 (D. Conn. 1974) (citing the view of an associate commissioner of the Social and Rehabilitation Service).

As another indication of the Government's view that Title XIX, as enacted, permits but does not require funding of non-therapeutic abortions, the Social and Rehabilitation Service has proposed to redefine the Title's "family planning services" pro-

The foregoing evidences the federal Government's view that Title XIX *neither prohibits, nor requires* a Medicaid state's payment for non-therapeutic abortions, and that such states are free to either provide or deny at their option medical assistance for such an abortion.

It is undisputed that the Government has pursued a policy of sharing in a state's funding of non-therapeutic abortions, pursuant to its stated position.

The majority's disregard of the stated views of the federal agencies concerned with administration of Title XIX, contravenes the settled rule that construction of a statute by an agency charged with its administration should be accorded great deference, absent compelling indications that it is clearly wrong.²⁰

This, too, must be said:

It cannot be gainsaid that Title XIX does not make any reference to abortions—therapeutic or elective—and that its legislative history is similarly silent on that score.

In recognition of that fact, the majority concededly reached its holding as to the force of Title XIX with respect to abortions—therapeutic and elective—by “in-

visions so that “neither therapeutic nor non-therapeutic abortions are to be considered as an item of family planning services for which Federal financial participation . . . is available . . . However, *Federal matching is available . . . for abortions when provided under the State plan as a physician's services or otherwise.*” Proposed HEW rule 45 C. F. R. §249.10(b)(4)(iii), 339 Fed. Reg. 42919, 42920 (December 9, 1974) (emphasis supplied).

²⁰ *Lewis v. Martin*, 397 U.S. 552, 559 (1970); *Rosado v. Wyman*, 397 U.S. 397, 415 (1970); *Federal Housing Administration v. Darlington, Inc.*, 358 U.S. 84, 90 (1958); *Bernstein v. Ribicoff*, 299 F. 2d 248, 253 (3d Cir.), *cert. denied*, 369 U.S. 887 (1962).

interpreting”²¹ Title XIX to support its conclusion. In doing so it said:

“It is *impossible to believe* that in enacting Title XIX Congress intended to freeze the medical services available to recipients as those which were legal in 1965.”

The quoted statement clearly falls into the category of argument criticized as a “departure from ordinary principles of statutory interpretation,” in the recent case of *Burns v. Alcala*, 43 U.S.L.W. 4374 (decided March 18, 1975).²²

²¹ The concession is expressed in the majority's following statement:

“By interpreting Title XIX as we have, we thus avoid an inquiry into the constitutionality of the Pennsylvania procedures. . .” (emphasis supplied).

²² In *Burns v. Alcala*, the Supreme Court was presented with the question: “whether States receiving federal financial aid under the program of Aid to Families with Dependent Children (AFDC) must offer welfare benefits to pregnant women for their unborn children.” 43 U.S.L.W. at 4374-75 (emphasis supplied). Viewing the matter as “one of statutory interpretation,” the Court held that the term “dependent children,” as presently defined by the Social Security Act does not encompass “unborn children,” and therefore a state is not required by the Act to include unborn children as those eligible for AFDC benefits, but may do so, in which event federal matching funds would be available. (The Court remanded the case, however, for consideration of the constitutional issues).

After reviewing the provisions of the Act governing AFDC eligibility, the Court stressed that its prior decisions in this area had not established “a special rule of [statutory] construction.” *Id.* at 4375. Lower courts, in considering the same issue, were admonished for departing from the “ordinary principles of statutory interpretation” as evidenced by their holdings that “persons

The same is true with respect to this further conclusory statement of the majority:

"We therefore conclude that *once* the state has decided to finance full-term delivery and therapeutic abortion as methods for the treatment of pregnancy, it *cannot decline to finance non-therapeutic abortions without violating the requirements of Title XIX.*" (emphasis supplied.)

It may be noted at this juncture that the stated construction of Title XIX is sharply at odds with that of the Solicitor General in his Amicus Curiae Memorandum.

In spelling out his views as to "the extent of the 'medical assistance' which must be provided" under Title XIX, the Solicitor General said:

"Furthermore, a participating state *need not pay for every kind of medical treatment* encompassed within those five categories. The state is required only to set 'reasonable standards' . . . for determining . . . the extent of medical assistance . . . *consistent with the objectives of [Title XIX]*' 42 U.S.C. 1396a (a) (17)," and, "[w]e disagree" with the contention "that the denial of assistance with respect to non-

who are *arguably* included' in the federal eligibility standard *must be* deemed eligible unless the Act or its legislative history clearly exhibits an intent to exclude them from coverage, in effect creating a presumption of coverage when the statute is ambiguous." *Id.* at 4376 (emphasis supplied).

In the instant case, the majority likewise departs from the "ordinary principles of statutory interpretation" by construing Title XIX as *requiring* payment for non-therapeutic abortions inasmuch as such abortions are "arguably" a "necessary medical service" reimbursable under the Medicaid Program.

medically indicated abortions is not 'reasonable' under 42 U.S.C. 1396a (a) (17)."

I agree with the Solicitor General's rejection of the contention that the denial of assistance with respect to non-medically indicated abortions is not reasonable under Title XIX.

The Title's use of the phrase "amount, duration and scope of services" in its various provisions, indicates that "Congress anticipated that states would limit the types of services they covered . . ." ²³

In summary, I would for all the reasons stated in the foregoing discussion, affirm the holding of the court below that the "*Pennsylvania Regulations do not conflict with Title XIX of the Social Security Act.*" (Emphasis supplied.)

II. THE CONSTITUTIONAL ISSUE

The court below held that the Pennsylvania Regulations "are unconstitutional because they are in violation of the Equal Protection Clause since they create an unlawful distinction between individual women who choose to carry their pregnancies to birth, and indigent women who choose to terminate their pregnancies by abortion." ²⁴

It premised its holding on these grounds:

"Under traditional Equal Protection standards, once the State chooses to pay for medical services rendered in

²³ Butler, *The Right to Abortion under Medicaid*, 7 Clearinghouse Review 713, 718 (1974).

²⁴ 376 F. Supp. at 191.

connection with the pregnancies of some indigent women, it cannot refuse to pay for the medical services rendered in connection with the pregnancies of other indigent women electing abortion, unless the disparate treatment supports a legitimate State interest,"²⁵ and, "the State's decision to limit coverage to 'medically indicated' abortions, as arbitrarily determined by it, is a limitation which promotes no valid State interest."²⁶

I would reverse the unconstitutionality holding of the court below, albeit the Eighth and Tenth Circuits and four district courts²⁷ have held unconstitutional regulations and statutes similar to the Pennsylvania Regulations, and no court has held to the contrary.²⁸

²⁵ *Id.* at 186.

²⁶ *Id.* at 191.

²⁷ See *Wulff v. Singleton*, 508 F. 2d 1211 (8th Cir. 1974), cert. granted, 43 U.S.L.W. 3670 (June 24, 1975); *Doe v. Rose*, 499 F. 2d 1112 (10th Cir. 1974); *Doe v. Myatt* Civ. No. A3-74-48 (D. N.D. Jan. 27, 1975); *Doe v. Westby*, 383 F. Supp. 1143 (D. S.D. 1974), vacated and remanded for consideration of the statutory grounds, 43 U.S.L.W. 3499 (March 17, 1975); *Doe v. Rampton*, 366 F. Supp. 189 (D. Utah 1973); *Klein v. Nassau County Medical Center*, 347 F. Supp. 496 (E.D. N.Y. 1972), vacated and remanded for further consideration in light of *Roe v. Wade* and *Doe v. Bolton*, 412 U.S. 925-26 (1973).

²⁸ The Sixth Circuit, however, remanded for consideration by a three-judge court the issue of constitutionality of an Ohio statute and administrative policy similar to the Pennsylvania Regulations after expressing its "disagreement with the Eighth Circuit's ruling in *Wulff v. Singleton*, 508 F. 2d 122 (8th Cir. 1974), that the unconstitutionality of this type of statute is so 'obvious and patent' as to obviate the need for a three-judge court." *Roe v. Ferguson*, 43 U.S.L.W. 2452 (April 28, 1975).

I agree with the dissenting view below that "there is no constitutional requirement that the State must finance exercise of a 'fundamental' right, nor does a classification which distinguishes between medically necessary and non-necessary abortions offend the Equal Protection Clause."²⁹

The sum of the holding of the court below is that since Pennsylvania's Medicaid program pays for medical services incident to full-term delivery and/or therapeutic abortions, it violates the Equal Protection Clause when it denies payment for an elective abortion.

The holding reflects the court's subscription to the plaintiffs' contention that an elective abortion is one way of handling a pregnancy and accordingly such an abortion falls within the category of "necessary medical care" extended by Pennsylvania to pregnant eligibles. It also reflects rejection of Pennsylvania's contentions that its Medicaid program provides only for extension of "necessary medical care," and its payment for a full-term delivery and/or therapeutic abortion properly fall within the range of reasonably-defined "necessary medical care" for the condition of pregnancy, and that a non-therapeutic (elective) abortion does not do so.

Discussion of the constitutional issue must be prefaced by these observations with respect to the present state of the law as indicated by Supreme Court decisions:

A woman has a constitutional right to terminate her pregnancy during its first two trimesters. *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973).

²⁹ *Id.* 376 F. Supp. at 193.

The Supreme Court did not hold in these cases that a state is under a duty to finance the exercise of the constitutional right to an elective abortion, nor has it ever held that *medical care in general* is a fundamental right, albeit it has recognized that "medical care is . . . 'a basic necessity of life' to an indigent . . ."³⁰

The Supreme Court has declined to designate welfare in general as a fundamental right,³¹ although it has recognized the critical importance of welfare as providing "the very means by which to live."³²

The cornerstone of the plaintiffs' contention is that the Regulations, *in the absence of a compelling state interest*, violate the Equal Protection Clause in that they discriminatorily divide pregnant eligibles *into two classes*—one which chooses to carry pregnancy to full term delivery, and another which elects to terminate pregnancy for non-therapeutic reasons.

The fallacy of the stated contention is that it disregards the fact that Pennsylvania in its medicaid program has committed itself to extend medical care to its eligibles only where "*necessary medical care*" is required. The only classification made by the Regulations is between necessary medical care and non-necessary medical care. Such a classification does not call into play the "compelling state interest" test. It is subject only to the "reasonable basis", otherwise stated, "rational basis" test, spelled out in *Dandridge v. Williams*, 397 U.S. 471 (1970). There, the

³⁰ *Memorial Hospital v. Maricopa Hospital*, 415 U.S. 250, 259 (1974).

³¹ *See, e.g., Jefferson v. Hackney*, 406 U.S. 535 (1972).

³² *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970).

Court held that a state regulation which reduced family welfare benefits did not violate the Equal Protection Clause. In doing so it said in relevant part at page 485:

"In the area of economics and *social welfare*, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. *If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.'* *Lindsey v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78. 'The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific.' *Metropolis Theater Co. v. City of Chicago*, 228 U.S. 61, 69-70." (emphasis supplied).

I am of the opinion that the classification between "necessary medical care" and "non-necessary medical care" survives the application of the "reasonable basis" and/or "rational basis" tests.

It cannot be gainsaid that full-term delivery and/or therapeutic abortions reasonably and rationally fall within the category of "necessary medical care" for a pregnant woman, and that an "elective" or non-therapeutic abortion does not do so.

This, too, must be said:

The holdings of unconstitutionality in the Eighth and Tenth Circuit cases, cited in note 27, rested in large part on the analysis of the three-judge district court in *Klein v.*

*Nassau County Medical Center*³³ in holding that providing financial assistance to pregnant mothers who carry their babies to full term and delivery while denying financial assistance to mothers who choose instead an "elective" abortion denied the latter mothers the equal protection of the laws guaranteed by the Fourteenth Amendment. That analysis, in only slightly different terms is also advanced before this court by the plaintiffs. The persuasiveness of the analysis depends upon a willingness to accept the posture of the mother as one in which she is required to "resign her freedom of choice" not to bear the fetus term.

³³ See note 27, *supra*. The *Klein* court said:

"The directive, and the State statute, if interpreted as mandating the Commissioner's directive, would deny indigent women the equal protection of the laws to which they are constitutionally entitled. *They alone are subjected to State coercion to bear children which they do not wish to bear*, and no other women similarly situated are so coerced. *Other women, able to afford the medical cost of either a justifiable abortifacient or full term child birth, have complete freedom to make the choice in the light of the manifold of considerations directly relevant to the problem uninhibited by any State action. The indigent is advised by the State that the State will deny her medical assistance unless she resigns her freedom of choice and bears the child.* She is denied the medical assistance unless she resigns her freedom of choice and bears the child. She is denied the medical assistance that is in general her statutory entitlement, and that is otherwise extended to her even with respect to her pregnancy. *She is thus discriminated against both by reason of her poverty and by reason of her behavioral choice.* . . ." 347 F. Supp. at 500. (emphasis supplied.)

It must be noted that the three other district court cases cited in note 27 have also rested their holdings on the reasoning of *Klein*.

There is both a verbal and an emotional appeal about this argument. But the legal and economic fact as well is not precisely stated in it. The compulsion to "resign her freedom of choice" derives not from the state policy but from the mother's poverty. The equal protection clause as sought to be used here would require this court to determine that the state, having undertaken to relieve *some* of the burdens of poverty is required to remedy *all* of poverty's burdens. The state, with some support from the medical profession, in reaching a determination of what is medically necessary, and unquestionably with support based on the prevailing mores of the majority of our society, has decided to remedy that problem of poverty which is represented by the costs of medical care during pregnancy and the delivery of the baby. From society's point of view, there are a variety of arguments for the wisdom of such public expenditure, most based upon the desirability of preserving the life and well being of the expectant mother and of assuring healthy babies. The state, thus far, has not concluded that avoidance of unwanted babies is as important as avoidance of unhealthy babies. This may well be an improper determination of values. A court may regard the two objectives as of equal magnitude and conclude that the state is quite wrong. It would be an error, however, for courts to displace the value judgment of the legislature with the value judgment of the court absent a finding that the value judgment of the legislature is proscribed by the Constitution.

There are probably no programs of the state or federal government affording financial assistance that do not contain within them, sometimes unarticulated, norms of conduct that are prerequisite to receiving the assistance.

Surely the unavailability of unemployment compensation to one who quits his or her job while affording it to one who has labored to retain it but has been laid off serves as an inducement to refrain from quitting. For the well-off person in our society, with some independent reserves, that inducement is irrelevant, and the individual is free to quit. For the low-income employee, that policy may well prevent the person from refusing to continue in employment that has become, perhaps, personally unbearable.

The examples could be multiplied. In their determinations of appropriate contexts of financial aid the federal and state legislatures have reflected societal prejudices about human conduct. These differentially affect the poor, who are dependent upon governmental assistance, and the more affluent, who are not. To require the states to forego this kind of policymaking would be to require the states to choose between leaving the pain of poverty unabated or to provide assistance neutral in its assertion of values. Not only would this seem to go well beyond present decisions of the Supreme Court of the United States in interpreting the equal protection clause but it would, if embraced, likely place financial assistance to the poor in many contexts beyond what is politically feasible, thus leaving all the poor worse off than under the present value distinctions made.

Only in the areas in which the poor are faced with governmentally imposed financial burdens—divorce court fees, appeal transcript fees—has the Supreme Court found that legislatures are constitutionally bound to relieve the poor of the burdens of their poverty. The instant case might be such a case, for example, if the Pennsylvania

legislature had established a minimum doctor's charge, or even more clearly, a state license fee for an elective abortion. But in the instant case, the burden carried by the indigent mother who desires, an elective abortion has not been made greater by the state. It has simply not been eased, whereas the state has eased the burden of the costs of pregnancy for the mother who wishes to carry the fetus until term. That kind of distinction in affordance of financial assistance has not till now and should not be subject to judicial supervision under the aegis of the Fourteenth Amendment.

The Equal Protection Clause does not provide cure-all panaceas, or Utopian solution, with respect to all the problems incident to the condition of poverty, e.g., inability of an indigent pregnant woman to privately finance her non-medically necessary (elective) abortion. Otherwise stated, the Equal Protection Clause cannot be construed to afford a guarantee against *all* the incidents of the condition of poverty.

III. THE DISCRIMINATORY ADMINISTRATION OF THE REGULATIONS

As earlier stated, I would enjoin enforcement of the Regulations on the ground that they are being administered in violation of the Equal Protection Clause in that *they are not enforced* against indigents who threaten suit when they are denied funding of an elective abortion, and *they are enforced* against those who do not threaten suit.

It has long been settled that State administrative procedures which are *per se* valid and constitutional may,

nevertheless, be enjoined when they are unconstitutionally applied. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). More recently, the Supreme Court has stressed that "a law non-discriminatory on its face may be grossly discriminatory in its operation". *Williams v. Illinois*, 399 U.S. 235, 242 (1970); *Griffin v. Illinois*, 351 U.S. 12 at page 17, n.11 (1956).

The Pennsylvania Department of Justice concedes³⁴ that "it entered into a policy of consenting to the granting of the requested relief [funding of an elective abortion] on an individual basis when . . . litigation was threatened", and it cites in corroboration a Stipulation detailing its policy filed in another action.

In making that concession, the Justice Department urges that "[t]his was *not* a policy of the Pennsylvania Department of Welfare in any way modifying the uniform application of the Pennsylvania Medicaid Regulations. This was, and still is, merely a policy of the lawyers for the defendant in pending litigation . . .".

The fact that Pennsylvania pays for an elective abortion when suit is threatened or pending establishes discriminatory administration of its Regulations. It is *utterly irrelevant* that payment for an elective abortion is made at the instance of "the lawyers for the defendant" and not by way "of the policy of the Department of the Pennsylvania Department of Welfare."

"The play's the thing."*

³⁴ Petition for Reargument of the Pennsylvania Department of Justice.

* Shakespeare, *Hamlet*, II, c.1601.

The sum total of the existing situation with respect to the Regulations is that they are enforced as to some pregnant indigents seeking elective abortions and denied as to others in the same category.

Standing alone, and independently so, the stated circumstances constitute violation of the Equal Protection Clause of the Fourteenth Amendment.

I would for this reason remand the cause to the court below with directions to enjoin enforcement of the Pennsylvania Regulations in light of their Administration in violation of the Equal Protection Clause of the Fourteenth Amendment.

Judge Gibbons joins in this dissenting opinion except as to Part III.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 74-1726 and 74-1727

Ann Doe; Betty Doe, a minor, by her mother as representative, Mother B. Doe; [Cathy Doe; Donna Doe,] a minor, by her mother as representative, Mother D. Doe; Elaine Doe; Jane Doe, a minor by her father as representative, Father J. Doe; Nancy Doe; Patricia Doe; Ruth Doe; Sylvia Doe; and Toni Doe, each individually and on behalf of all other women similarly situated,

Appellants in No. 74-1727

v.

Frank S. Beal, individually and as Secretary of the Department of Public Welfare, Commonwealth of Pennsylvania; Roger Cutt, individually and as Assistant Deputy Secretary for Medical Services, Commonwealth of Pennsylvania; Glenn Johnson, individually and as Chief of the Bureau of Medical Assistance, Commonwealth of Pennsylvania; James A. Dorsey, Jr., individually and as Executive Director of the Allegheny County Board of Assistance; and the Department of Public Welfare, of the Commonwealth of Pennsylvania,

Appellants in No. 74-1726

(D.C. Civil No. 73-846)

Appeal From the United States District Court
for the Western District of Pennsylvania

Present: Seitz, *Chief Judge* and Kalodner, Van Dusen,
Aldisert, Adams, Gibbons, Rosenn, Hunter and Garth,
Circuit Judges

JUDGMENT ON REHEARING

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued and later reargued en banc by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court filed May 28, 1974, be, and the same is hereby modified to read as follows:

“ . . . IT IS HEREBY ADJUDGED AND DECREED that the Regulations and Procedures of the Department of Public Welfare of the Commonwealth of Pennsylvania, as they apply to reimbursement for abortions performed within the first two trimesters of pregnancy, are invalid because they are inconsistent with Title XIX of the Social Security Act, 42 U.S.C. §1396, *et seq.* In all other respects, Plaintiffs' Request for Declaratory Judgment are denied.”

The cause is hereby remanded to the said District Court so that the three-judge court can be dissolved and

the assigned district judge can take any further action required, consistent with the opinion of this Court. Costs taxed against defendant-appellants at No. 74-1726.

ATTEST:

THOMAS P. QUINN

Clerk

July 21, 1975

ADAMS, *Circuit Judge*, dissenting:

I respectfully dissent from the majority. In my judgment, the Pennsylvania regulations are not incompatible with the scheme of medical aid to indigents envisaged by Congress in Title XIX of the Social Security Act. In addition, I do not believe that the Pennsylvania schedule for reimbursements, that includes only medically indicated abortions, violates the Constitution.¹

These conclusions are grounded on reasons set forth in the dissenting opinion of Judge Kalodner here, and that of Judge Weis in the district court, and are based also on the various authorities referred to in those opinions.

¹ It would appear, however, that the Pennsylvania regulation may not be enforced insofar as it predicates eligibility for medical assistance payments on conditions that were specifically invalidated in *Doe v. Bolton*, 410 U.S. 179 (1973), namely a concurrence of two doctors and performance of the procedure in an accredited hospital.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-554

FRANK S. BEAL, Individually and as Secretary of the Department of Public Welfare, Commonwealth of Pennsylvania; ROGER CUTT, Individually and as Assistant Deputy Secretary for Medical Services, Commonwealth of Pennsylvania; GLENN JOHNSON, Individually and as Chief of the Bureau of Medical Assistance, Commonwealth of Pennsylvania; EDWARD KALBERER, Individually and as Executive Director of the Allegheny County Board of Assistance; and THE DEPARTMENT OF PUBLIC WELFARE, OF THE COMMONWEALTH OF PENNSYLVANIA,

Petitioners,

v.

ANN DOE; BETTY DOE, a Minor, by Her Mother as Representative, Mother E. Doe; CATHY DOE; DONNA DOE; a Minor, by her Mother as Representative Mother D. Doe; ELAINE DOE; JANE DOE, a Minor, by Her Father as Representative, Father J. Doe; NANCY DOE; PATRICIA DOE; RUTH DOE; SYLVIA DOE; and TONI DOE, Each Individually and on Behalf of All Other Women Similarly Situated,

Respondents.

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

R. Stanton Wettick, Jr.
310 Plaza Building
Pittsburgh, PA 15219
412 - 281-1662

Attorney for Respondents

NOV 25 1975

MICHAEL RODAK, JR., CLERK

TABLE OF CONTENTS

	<u>Page</u>
Question Presented	1
Statement of the Case	2
Argument	
This Court should decline to review the ruling of the Court of Appeals for the Third Circuit that declared invalid regulations of the Pennsylvania Department of Public Welfare which exclude from Medical Assistance reimbursement many abortions performed by physicians during the first two trimesters of indigent patients' pregnancies.....	4
I. The Pennsylvania Department of Welfare regulations which exclude from Medical Assistance reimbursement many abortions performed by physicians during the first two trimesters of indigent patients' pregnancies are invalid.....	4
II. No Federal Courts have upheld state regulations denying Medical Assistance reimbursement for "non-therapeutic" abortions.....	8
III. A reversal of the Court of Appeals' ruling would lead to more appellate review.....	11
Conclusion	12

TABLE OF CITATIONS

<u>Cases:</u>	<u>Page</u>
<u>Doe v. Beale</u> , F.2d (3rd Cir., 7/21/75, 60a-120a).....	8
<u>Doe v. Bolton</u> , 410 U.S. 179, 93 S. Ct. 739 (1973).....	6, 7, 8
<u>Doe v. Myatt</u> , F. Supp. (D. North Dakota, 10/30/75, Docket No. A3-74-48).....	8, 9
<u>Doe v. O'Bannon</u> , F. Supp. (D. Minn., August 1, 1975, No. 4-74-Civ. 69).....	9
<u>Doe v. Rampton</u> , 366 F. Supp. 189 (D. Utah 1973).....	9
<u>Doe v. Rose</u> , 499 F.2d 1112 (10 Cir. 1974).....	9, 11

TABLE OF CITATIONS CONT'D.

QUESTION PRESENTED

<u>Cases:</u>	<u>Page</u>
<u>Doe v. Westby</u> , 383 F. Supp. 1143 (D. South Dakota, 1974), vacated and remanded, 415 U.S. 543, 95 S. Ct. 1385 (1975), _____ F. Supp. (D. South Dakota, September 29, 1975, Docket No. C-74-5017).....	8, 9
<u>Klein v. Nassau County Medical Center</u> , 347 F. Supp. 496 (E.D.N.Y. 1972), vacated and remanded at 412 U.S. 924, 93 S. Ct. 2747 (1973).....	8, 9
<u>Memorail Hospital v. Maricopa County</u> , 415 U.S. 250, 94 S. Ct. 1076 (1974).....	6
<u>Roe v. Ferguson</u> , 515 F.2d 279 (6 Cir. 1975).....	9
<u>Roe v. Norton</u> , _____ F.2d _____, (2 Cir., 7/31/75, Docket No. 74-1874).....	9, 10
<u>Roe v. Wade</u> , 410 U.S. 113, 93 S. Ct. 705 (1973).....	6, 7, 8
<u>Shapiro v. Thompson</u> , 394 U.S. 618, 89 S. Ct. 1322 (1969).....	6
<u>Sherbert v. Verner</u> , 374 U.S. 398, 83 S. Ct. 1790 (1963).....	7
<u>Smith v. Tinder</u> , (S.D. W. Vir., August 8, 1975, Docket No. 75-0380) (Stipulated Judgment).....	8, 9
<u>Wulff v. Singleton</u> , 508 F.2d 1211 (8 Cir. 1974), cert. granted on standing and procedural issues at _____ U.S. _____ (1975).....	9, 11
 <u>Statutes:</u>	
28 U.S.C. §1396, <u>et seq.</u>	4, 5, 8, 9, 10

Whether this Court should review on writ of certiorari a ruling of the Court of Appeals for the Third Circuit that declared invalid regulations of the Pennsylvania Department of Public Welfare which exclude from Medical Assistance reimbursement many abortions performed by physicians during the first two trimesters of indigent patients' pregnancies.

STATEMENT OF THE CASE

This action was instituted on October 3, 1973 in the Federal District Court for the Western District of Pennsylvania at 73-846 by eleven indigent pregnant women who are eligible for benefits under the Pennsylvania Medical Assistance Program. These women had been denied abortions by a Pittsburgh hospital because they had not met the requirements of the Pennsylvania Department of Public Welfare for obtaining Medical Assistance reimbursement for abortions (hereafter referred to as "DPW Abortion Procedures").* They requested the District Court to declare these DPW Abortion Procedures invalid on constitutional and statutory grounds and to enjoin defendants (the Pennsylvania Department of Public Welfare and certain of its officers and/or administrative representatives) from denying Medical Assistance reimbursement for first and second trimester abortions provided to Medical Assistance recipients by licensed physicians.

On May 3, 1974 a three-judge District Court, with one dissenting opinion, ruled that the DPW Abortion Procedures were unconstitutional as applied to abortions performed by a licensed physician within the first twelve weeks of pregnancy. The Court, however, granted no relief as to second trimester abortions.

Plaintiffs appealed to the Court of Appeals for the Third Circuit from the portions of the District Court Opinion, Order and Supplemental Order which denied their requests for

* The DPW Abortion procedures provide for Medical Assistance reimbursement for abortions only in the following situations: (1) There is documented medical evidence that continuance of the pregnancy may threaten the health or life of the mother; (2) There is documented medical evidence that the infant may be born with incapacitating physical deformity or mental deficiency; (3) There is documented medical evidence that a continuance of a pregnancy resulting from legally established statutory or forcible rape or incest, may constitute a threat to the mental or physical health of a patient; (4) Two other physicians chosen because of their recognized professional competency have examined the patient and have concurred in writing; and (5) The procedure is performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals.

declaratory relief for second trimester abortions and defendants appealed to the same Court from the portions of the District Court Opinion, Order and Supplemental Order which declared the DPW Abortion Procedures unconstitutional as applied to abortions performed during the first twelve weeks of pregnancy. After argument before a panel of three Circuit Court Judges, the Court of Appeals for the Third Circuit at Nos. 74-1726/74-1727 directed the District Court to enter an order enjoining enforcement of the DPW Abortion Procedures for reasons not related to the validity of these Procedures.

Pursuant to petitions for rehearing filed by both parties, the case was reargued before the Court of Appeals en banc. On July 21, 1975 the Court of Appeals en banc (with three judges dissenting) decreed that the DPW Abortion Procedures, as they apply to reimbursement for abortions performed within the first two trimesters of pregnancy, are invalid because they are inconsistent with Title XIX of the Social Security Act, 42 U.S.C. §1396, et seq. And having found the DPW Abortion Procedures to be invalid on statutory grounds, the Court did not consider plaintiffs' constitutional claim.

It is from this decision that defendants seek a writ of certiorari.

ARGUMENT

This Court should decline to review the ruling of the Court of Appeals for the Third Circuit that declared invalid regulations of the Pennsylvania Department of Public Welfare which exclude from Medical Assistance reimbursement many abortions performed by physicians during the first two trimesters of indigent patients' pregnancies.

I.

The Pennsylvania Department of Welfare regulations which exclude from Medical Assistance reimbursement many abortions performed by physicians during the first two trimesters of indigent patients' pregnancies are invalid.

A. Statutory Claim

The Medicaid Program, governed by Title XIX of the Social Security Act, 42 U.S.C. §§1396 et seq., provides a comprehensive scheme of federal financial assistance to enable states electing to participate to furnish medical assistance to indigent persons. The program, administered by the participating states, is jointly funded by federal grants-in-aid and participating states.

A state which elects to participate in the Medical Assistance Program must comply with the requirements of Title XIX of the Social Security Act and with regulations promulgated thereunder. A paramount statutory requirement for participating states is that they provide certain medical services to all recipients. Pennsylvania, for example, must provide to all Medical Assistance recipients the following services: (1) inpatient hospital services; (2) outpatient hospital services; (3) other laboratory and X-ray services; (4) skilled nursing facility services, screening and diagnosis of children, family planning services and supplies furnished to individuals of child-bearing age; and (5) physicians' services furnished by a physician whether in the office, patient's home, hospital or

elsewhere. 42 U.S.C. §1396a(a)(13)(B). While abortion services fall within certain of these five mandatory categories of service, as defined by Title XIX and HEW regulations, Pennsylvania contends that it has broad discretion to determine the type and scope of services which it provides within these five categories of services, including the discretion to exclude from Medical Assistance reimbursement any treatment which it defines as "unnecessary". And according to Pennsylvania, the DPW Abortion Procedures which exclude "non-therapeutic" abortions from Medical Assistance reimbursement is a proper exercise of such discretion.

Assuming that Pennsylvania may exclude "unnecessary" treatment from Medical Assistance reimbursement, however, its determination of what medical treatment is "unnecessary" must be consistent with the requirements, standards and policies of Title XIX. For the reasons expressed by the Court of Appeals for the Third Circuit, Pennsylvania's Abortion Procedures are not justified by any statutory policy and furthermore run directly counter to various requirements, standards and policies of Title XIX. These include the requirement that the medical assistance made available to a recipient shall not be less in amount, duration or scope than the medical assistance available to other recipients (§1396a(a)(10)(B) and (C)); the requirement that the state safeguard "the best interests of the recipients" (§1396a(a)(19)); and the Congressional objective that the choice of treatment of a condition be left to the judgment of the attending physician unless a state can show that its interference with physicians' medical decisions promotes policies of Title XIX. See, generally, Opinion of the Court of Appeals for the Third Circuit at 69a-84a.

B. Constitutional Claim

The Pennsylvania Medical Assistance Program provides

medical services to each indigent pregnant woman who carries her pregnancy to birth. On the other hand, the indigent pregnant woman who seeks to terminate her pregnancy by abortion (with limited exceptions) is denied free medical services. Thus Pennsylvania has created two classes of indigent pregnant women: those who continue their pregnancies to birth and those who seek to terminate their pregnancies by abortion.

The decision whether or not to terminate a pregnancy is constitutionally protected from state interference. Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705 (1973); Doe v. Bolton, 410 U.S. 179, 93 S. Ct. 739 (1973). Consequently, in the absence of a compelling state interest, Pennsylvania cannot create two classes of needy people indistinguishable from each other except that one is composed of persons who choose to continue their pregnancies to birth and the other of persons who in consultation with their attending physicians choose to exercise their constitutional right to terminate their pregnancies by abortion. See Memorial Hospital v. Maricopa County, 415 U.S. 250, 94 S. Ct. 1076 (1974); Shapiro v. Thompson, 394 U.S. 618, 89 S. Ct. 1322 (1969).

Clearly Pennsylvania's classification does not promote a compelling state interest. In fact, plaintiffs successfully argued in the District Court that even if the DPW Abortion Procedures were judged by the "rational basis" Equal Protection standards used to determine the constitutionality of a classification which does not infringe upon a fundamental right, the Procedures are unconstitutional. In its Opinion, the District Court reviewed the various justifications which Pennsylvania might offer for denying Medical Assistance reimbursement to indigent women who in consultation with their physicians seek first trimester abortions and found no valid state interest to be promoted by excluding such abortions from Medical Assistance reimbursement:

We hold that the State's decision to limit coverage to 'medically indicated' abortions, as arbitrarily determined by it, is a limitation which promotes no valid State interest. 37a

Pennsylvania argues that a "non-therapeutic" abortion is "unnecessary" because the patient can continue her pregnancy to birth. It is, however, equally valid to characterize the services rendered in connection with childbirth as "unnecessary" because these more risky and more expensive services could have been avoided by an earlier abortion. The fact of the matter is that pregnancy is a physical condition which requires medical services and after Roe and Doe, abortion and childbirth are each proper methods of treating the condition. Thus where the attending physician in consultation with the patient determines in the exercise of his or her medical judgment that an abortion is an appropriate method of treating the patient's pregnancy condition, there is no reasonable basis for characterizing this treatment as unnecessary and therefore outside the coverage of the Medical Assistance Program. It is the condition to be treated, and not the choice of treatment, that determines whether the services are necessary. See fn. 20, Opinion of the Court of Appeals for the Third Circuit.

By providing Medical Assistance reimbursement only to women who continue their pregnancies to childbirth, Pennsylvania requires an indigent pregnant woman to forfeit her constitutional right to terminate her pregnancy in order to receive free medical services. This is constitutionally impermissible. A state may not condition receipt of statutory benefits upon forfeiture of constitutional rights. See Sherbert v. Verner, 374 U.S. 398, 83 S. Ct. 1790 (1963). As the District Court in the present case said in its Opinion:

...we hold that the Commonwealth has already determined that the condition of pregnancy brings about the necessity of medical services. The Commonwealth cannot then discriminate with respect to the methods of treatment for that condition, for in the first trimester of pregnancy, Roe v. Wade,

supra, the selection of the method of treatment is the inviolable fundamental right of the physician and the patient.

.

As agreed by the Dissent, we are not to determine the presence or absence of a compelling State interest in the first trimester of pregnancy—the Supreme Court of the United States has eliminated this problem in declaring the fundamental right of the physician and patient as being paramount to the interest of the State. We do not hold that the State must finance a fundamental right, but we hold that the expression of that fundamental right cannot be the basis for invidious discrimination.
pp. 39a-40a

II.

No Federal Courts have upheld state regulations denying Medical Assistance reimbursement for "non-therapeutic" abortions.

In numerous cases indigent pregnant women who participate in state Medical Assistance programs have questioned the legality of state restrictions on Medical Assistance reimbursement for "non-therapeutic" abortions performed by licensed physicians. In most of these cases the legality of these restrictions has been questioned on both statutory and constitutional grounds.

There is a split of authority as to whether such restrictions violate Title XIX of the Social Security Act, 42 U.S.C. §1396. In the following cases, courts have held that such restrictions are inconsistent with Title XIX: Doe v. Beale, ____ F.2d ____ (3rd Cir., 7/21/75, 60a-120a); Doe v. Westby, ____ F. Supp. ____ (D. South Dakota, September 29, 1975, Docket No. C-74-5017); Doe v. Myatt, ____ F. Supp. ____ (D. North Dakota, 10/30/75, Docket No. A3-74-48); Klein v. Nassau County Medical Center, 347 F. Supp. 496 (E.D.N.Y. 1972), vacated and remanded in light of Doe v. Bolton and Roe v. Wade, 412 U.S. 924, 93 S. Ct. 2747 (1973); Smith v. Tinder, (S.D. W. Vir., Aug. 8, 1975,

Docket No. 75-0390) (Stipulated Judgment).

A contrary result has been reached by the following courts: Roe v. Ferguson, 515 F.2d 279 (6 Cir. 1975), reversing 389 F. Supp. 387 (S.D. Ohio 1974); Roe v. Norton, ____ F.2d ____ (2nd Cir., 7/31/75, Docket No. 74-1874), reversing 380 F. Supp. 726 (D. Conn. 1974). Also see Doe v. Rose, 499 F.2d 1112, 1114-5 (10 Cir. 1974).

When a court concludes that restrictions on Medical Assistance reimbursement for abortions do not violate Title XIX of the Social Security Act, the court, of course, must consider the constitutional claim. And in cases in which federal courts have reached the constitutional claim, they, without exception, find such restrictions to be invalid on constitutional grounds. See Wulff v. Singleton, 508 F.2d 1211 (8 Cir. 1974), cert. granted on standing and procedural issues at ____ U.S. ____ (1975); Doe v. Rose, supra; Doe v. Westby, 383 F. Supp. 1143 (D. South Dakota, 1974), vacated and remanded in light of Hagans v. Lavine, 415 U.S. 543, 95 S. Ct. 1385 (1975), ____ F. Supp. ____ (D. South Dakota, September 29, 1975, Docket No. C-74-5017); Doe v. Myatt, supra; Doe v. Rampton, 366 F. Supp. 189 (D. Utah, 1973); Klein v. Nassau County Medical Center, supra; Doe v. O'Bannon, ____ F. Supp. ____ (D. Minn., August 1, 1975, No. 4-74-Civ. 69); and Smith v. Tinder, supra.

On the basis of Roe v. Ferguson, supra, and Roe v. Norton, supra, which reverse District Court rulings that Ohio and Connecticut restrictions on Medical Assistance reimbursement for abortions violate Title XIX of the Social Security Act, petitioners contend this Court's intervention is necessary to resolve a conflict amongst the federal courts. In Roe v. Ferguson and Roe v. Norton, however, the Court of Appeals did not uphold the Ohio and Connecticut restrictions but, instead, remanded the cases to the District Courts to consider plaintiffs' constitutional claim.

The issue which concerns the parties is the legality of restrictions on Medical Assistance reimbursement for abortions performed by physicians during the first two trimesters of pregnancy. The relief provided to the parties is the same regardless of whether the restrictions are stricken on statutory or constitutional grounds.

There is no need for intervention by this Court where federal courts reach the same result, but for different reasons, because in this situation the rights and liabilities of the parties, as determined by the federal courts, are uniform.* Thus unless and until a federal court rejects both the constitutional and statutory challenges to state restrictions on Medical Assistance reimbursement for abortions, there is no conflict requiring intervention by this Court.

* HEW takes the position that a state Medical Assistance program may provide reimbursement for non-therapeutic abortions and that the federal government will share these costs with the states pursuant to Title XIX of the Social Security Act. See Dissenting Opinion of Court of Appeals, 102a-104a; Roe v. Norton, *supra*, slip op. at 5305-6. Thus the split of opinion within the circuit courts as to whether Title XIX requires federal reimbursement for non-therapeutic abortions does not place a state in the position of jeopardizing its federal funding by following decisions of the federal courts that reimbursement under Title XIX is required.

III.

A reversal of the Court of Appeals' ruling would lead to more appellate review.*

In the federal court cases cited previously, the question of federal law is the legality of restrictions on Medical Assistance reimbursement for abortions. If petitioners' request that this Court reverse the ruling of the Court of Appeals for the Third Circuit were granted, this question of the legality of such restrictions would still be unresolved. The effect of the reversal would be to require the parties to this proceeding to litigate in the Court of Appeals for the Third Circuit the constitutionality of petitioners' Abortion Procedures. And the losing party would undoubtedly request this Court to review any ruling of the Court of Appeals.

Also the uncertainty created by a reversal of the Court of Appeals' ruling would work a serious hardship on indigent pregnant women throughout Pennsylvania. Such women cannot obtain abortions unless hospitals and physicians provide such services without charge. Most hospitals and physicians, however, will not provide such services without charge if their right to reimbursement from Pennsylvania's Medical Assistance Program is uncertain. At the present time, Pennsylvania, in response to the ruling of the Court of Appeals for the Third

* For purposes of this argument, respondents assume that this Court is being requested to review only whether petitioners' Abortion Regulations are consistent with Title XIX of the Social Security Act. If this Court were to consider both statutory and constitutional claims, obviously the entire issue will be resolved. Respondents suggest, however, that the constitutional claim is premature and also that it should be considered in a case in which the decision being reviewed considered this claim. The constitutional claim is premature because only two circuit courts have considered this claim: Wulff v. Singleton, *supra* (8 Cir.) and Doe v. Rose, *supra* (10 Cir.). If the circuit courts continue to agree that restrictions on Medical Assistance reimbursement for abortions are unconstitutional, there would perhaps be no need for this Court to review the constitutional claim. On the other hand, if any courts conclude that such restrictions are constitutional, the issues will be more fully developed for review by this Court.

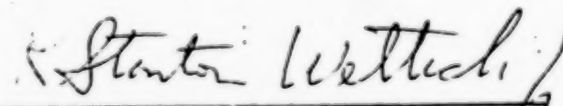
Circuit, has adopted temporary regulations which guarantee Medical Assistance reimbursement for first and second trimester abortions. These regulations were adopted solely because of the Court of Appeals' ruling that Title XIX of the Social Security Act requires Pennsylvania to provide reimbursement for first and second trimester abortions and will immediately be revoked if this Court were to reverse the ruling of the Court of Appeals. This, in turn, would result in hospitals and physicians ceasing to provide abortions to Medical Assistance recipients until the constitutionality of petitioners' Abortion Procedures was resolved.

Even assuming that the legality of restrictions on Medical Assistance reimbursement is an important question of federal law which should be settled by this Court, this is not the case in which the issue should be settled. Cases will arise in which the appellate court considered both the constitutional and statutory arguments and review of such a case would be far more appropriate to resolve questions concerning the legality of such restrictions.

Conclusion

For the reasons stated herein, respondents request that Pennsylvania's Petition for Writ of Certiorari be dismissed.

Respectfully submitted,



R. STANTON WETTICK, JR.
Attorney for Respondents

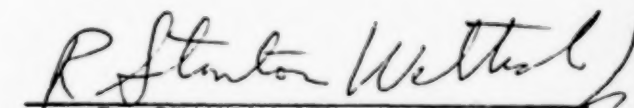
Neighborhood Legal Services
Association
310 Plaza Building
Pittsburgh, PA 15219
(412) 281-1662

CERTIFICATE OF SERVICE

I, R. Stanton Wettick, Jr., hereby certify that service of Respondents' Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit was made on counsel for petitioners by delivering and/or mailing by first-class postage prepaid a copy of said Brief to Norman J. Watkins, Deputy Attorney General, Department of Justice, Capitol Annex, Harrisburg, Pennsylvania 17120.

I further certify that all parties required to be served have been served.

Dated: November 24, 1975


R. STANTON WETTICK, JR.
Attorney for Respondents

RECEIVED

NOV 25 1975

OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-554

FRANK S. BEAL, Individually and as Secretary of the Department of Public Welfare, Commonwealth of Pennsylvania; ROGER CUTT, Individually and as Assistant Deputy Secretary for Medical Services, Commonwealth of Pennsylvania; GLENN JOHNSON, Individually and as Chief of the Bureau of Medical Assistance, Commonwealth of Pennsylvania; EDWARD KALBERER, Individually and as Executive Director of the Allegheny County Board of Assistance; and THE DEPARTMENT OF PUBLIC WELFARE, OF THE COMMONWEALTH OF PENNSYLVANIA,

Petitioners,

v.

ANN DOE; BETTY DOE, a Minor, by Her Mother as Representative, Mother B. Doe; CATHY DOE; DONNA DOE; a Minor, by her Mother as Representative, Mother D. Doe; ELAINE DOE; JANE DOE, a Minor, by Her Father as Representative, Father J. Doe; NANCY DOE; PATRICIA DOE; RUTH DOE; SYLVIA DOE; and TONI DOE, Each Individually and on Behalf of All Other Women Similarly Situated,

Respondents.

MOTION OF RESPONDENTS FOR
LEAVE TO PROCEED IN FORMA PAUPERIS

R. Stanton Wettick, Jr.
310 Plaza Building
Pittsburgh, PA 15219
412- 281-1662

To the Honorable, the Chief Justice and the Associate Justices
of the Supreme Court of the United States:

Respondents by their attorney, R. Stanton Wettick,
Jr., move this Honorable Court for an order granting leave to
proceed in forma pauperis in the proceedings before this Court
pursuant to United States Supreme Court Rule 53 and 28 U.S.C.
§1915 and for leave to file briefs, appendices and other papers
in typewritten form.

In support of said Motion, Respondents submit the
affidavit attached hereto.

R. Stanton Wettick, Jr.
R. STANTON WETTICK, JR.

Neighborhood Legal Services
Association
310 Plaza Building
535 Fifth Avenue
Pittsburgh, PA 15219
(412) 281-1662

ATTORNEY FOR RESPONDENTS

CERTIFICATE OF SERVICE

I, R. Stanton Wettick, Jr., hereby certify that
service of Respondents' Motion for Leave to Proceed in Forma
Pauperis, together with the attached affidavit, was made on
counsel for petitioners by delivering and/or mailing by first-
class postage prepaid a copy of said Motion to Norman J. Watkins,
Deputy Attorney General, Department of Justice, Capital Annex,
Harrisburg, Pennsylvania 17120.

All parties required to be served have been served.

DATED: November 24, 1975

R. Stanton Wettick, Jr.
R. STANTON WETTICK, JR.
Attorney for Respondents

AFFIDAVIT IN SUPPORT OF MOTION FOR
LEAVE TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, R. Stanton Wettick, Jr., being duly sworn, depose and say:

1. I am counsel for the Respondents in the proceedings before this Court.

2. To the best of my knowledge, information and belief, Respondents are without money or other property with which to pay the costs of printing Respondents' Brief in the proceedings before this Court or any other fees or costs.

3. At the time these proceedings were instituted, each of the eleven Respondents was an indigent woman eligible for benefits under the Pennsylvania Medical Assistance Program, a program to provide free medical assistance to low-income persons.

4. Affidavits of each of the eleven Respondents were filed with the District Court in which each Respondent averred that she was a Public Assistance recipient and did not have funds to pay for an abortion. See pp. 26a-47a, Appendix filed in the Court of Appeals for the Third Circuit.

5. The issue in this case concerns only matters of interest to indigent persons, namely the legality of Department of Public Welfare Regulations which exclude many abortions from Medical Assistance coverage.

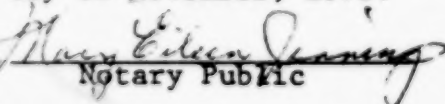
6. Respondents were permitted to proceed in forma pauperis in the proceedings before the Court of Appeals for the Third Circuit.


R. STANTON WETTICK, JR.

SWORN to and subscribed

before me this 24th

day of November, 1975.


Notary Public

Supreme Court, U. S.
FILED

AUG 20 1976

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

October Term, 1976

No. 75-554

FRANK S. BEAL, Individually and as Secretary of the Department of Public Welfare, Commonwealth of Pennsylvania; ROGER CUTT, Individually and as Assistant Deputy Secretary for Medical Services, Commonwealth of Pennsylvania; GLENN JOHNSON, Individually and as Chief of the Bureau of Medical Assistance, Commonwealth of Pennsylvania; JAMES A. DORSEY, JR., Individually and as Executive Director of the Allegheny County Board of Assistance; and the DEPARTMENT OF PUBLIC WELFARE OF THE COMMONWEALTH OF PENNSYLVANIA,

Petitioners

vs.

ANN DOE; BETTY DOE, a Minor by Her Mother as Representative, MOTHER B. DOE; CATHY DOE; DONNA DOE, a Minor, by Her Mother as Representative, MOTHER D. DOE; ELAINE DOE; JANE DOE, a Minor by Her Father as Representative, FATHER J. DOE; NANCY DOE; PATRICIA DOE; RUTH DOE; SYLVIA DOE; and TONI DOE, Each Individually and on Behalf of All Other Women Similarly Situated,

Respondents

Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR PETITIONERS

NORMAN J. WATKINS
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TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	1
Statutes and Regulations Involved	2
Question Presented	2
Statement of the Case	3
Summary of Argument	7
Argument:	
A. Medicaid in Pennsylvania: an overview	8
B. Title XIX of the Social Security Act does not require that a participating state pro- vide medicaid funds for the costs of non- therapeutic abortions	13
Conclusion	23
Appendix:	
42 U.S.C.A. §1396	24
42 U.S.C.A. §1396 (a)	25
Pennsylvania General Medicaid Regulations—M. A. Man. §9100	52
Temporary Revised Policy	73
Abortion Policy—Pennsylvania Medical Society	79

TABLE OF CITATIONS

CASES:	
Burns v. Acala, 420 U.S. 575 (1975)	14, 15

OPINIONS BELOW

The majority and dissenting opinions of the District Court are reported at 376 F. Supp. 173, and are set out in the Appendix at 66a-114a. The majority and dissenting opinions of the Court of Appeals *en banc*, reported at 523 F.2d 611, are set out in the appendix at 126a-186a.*

JURISDICTION

The judgment of the Court of Appeals was entered on July 21, 1975, the Petition for Certiorari was filed on October 10, 1975 and certiorari was granted on July 6, 1976. The jurisdiction of this Court is invoked under 28 U.S.C.A. §1254(1).

* The decision of a panel of the court of appeals, not officially reported is set out in the Appendix at 117a-123a.

Statutes and Regulations Involved
Question Presented

STATUTES AND REGULATIONS INVOLVED

The Social Security Act, Title XIX, §1902, as added July 30, 1965, Pub. L. 89-97, 79 Stat. 344, 42 U.S.C.A. §§1396 and 1396(a) are set out in the appendix to this brief at 24, *infra*.

The Pennsylvania General Medicaid Regulations, M. A. Man. §9100 are set out in the appendix to this brief at 52, *infra*.

QUESTION PRESENTED

Whether Title XIX of the Social Security Act requires that states, participating in the federal-state Medical Assistance Program, provide coverage for the costs of non-therapeutic abortion services.

Statement of the Case

STATEMENT OF THE CASE

In October of 1973 each of the respondents was pregnant and desired an abortion for non-medical reasons. Most of the women wished to avoid the inconvenience of child birth. Others wanted to terminate their pregnancies for financial reasons, and one of the respondents desired to avoid the interference a birth would have on her schooling (44a-65a).¹ However, all of these women, then eligible for medical assistance (medicaid),² were refused the desired medical services because they were unable to demonstrate that the services would be covered by medicaid.

Pennsylvania's medicaid program covers the reasonable costs of abortions that are medically necessary.³ Un-

¹ From the affidavits it is apparent that two of the respondents may have qualified for therapeutic abortions: Cathy Doe referred to deteriorating medical conditions as a reason for desiring an abortion and Ann Doe mentioned "medical problems" as a reason for seeking an abortion. That being so, it is unclear why these women were not able to present the required documentation of medical need. Nevertheless, it is clear that the remaining nine desired abortions for reasons other than health. For example, Toni Doe and Nancy Doe each affirmatively stated that they did not seek their abortions "... for any of the purposes contained in the Department of Public Welfare procedures governing Medical Assistance coverage of abortions." (46a, 49a).

² Of the eleven individual respondents, six were then receiving Aid to Families with Dependent Children (AFDC) and five were receiving public assistance grants from the Commonwealth of Pennsylvania. (44a-65a).

³ On September 25, 1975, as the result of the decision of the court of appeals in this case, and in accord therewith, a Temporary

Statement of the Case

der this program an abortion is deemed to be medically necessary if:

(1) There is documented medical evidence that continuance of the pregnancy may threaten the health of the mother;

(2) There is documented medical evidence that an infant may be born with incapacitating physical deformity or mental deficiency; or

(3) There is documented medical evidence that continuance of a pregnancy resulting from legally established statutory or forcible rape or incest, may constitute a threat to the mental or physical health of a patient; and

(4) Two other physicians chosen because of their recognized professional competency have examined the patient and have concurred in writing;⁴ and

(5) The procedure is performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals.⁵

On October 3, 1973, the respondents instituted this civil rights action seeking to compel the petitioners to extend medicaid coverage to the costs of non-therapeutic

Revised Policy was instituted by the petitioners which allows payment for any abortion irrespective of its medical necessity (*infra*). This is purely an interim policy depending final deposition of this appeal.

⁴ This requirement of two-doctor concurrence tracks the formal position of the Pennsylvania Medical Society (p. 79, *infra*).

⁵ 3 Pennsylvania Bulletin, 2207, 2209 (Sept. 29, 1973), and Med. Soc. Policy, p. 79 *infra*.

Statement of the Case

abortions.⁶ Their challenge to Pennsylvania's Medicaid regulations regarding abortions was predicated on two theories: first, that the regulations violated Title XIX of the Social Security Act;⁷ and secondly that these restrictions denied the respondents equal protection of the laws in violation of the Fourteenth Amendment to the Constitution. On October 9, 1973 a preliminary injunction was issued requiring the Petitioners to reimburse the reasonable costs of these abortions.⁸

A three-judge court was convened pursuant to 28 U.S.C.A. §2281, and by majority opinion the district court concluded that Pennsylvania's medical necessity requirement, with respect to abortions, was consistent with Title XIX. However, the Court went on to find that this restriction violated the Equal Protection Clause⁹ as applied during the first trimester of pregnancy.

Petitioners appealed to the court of appeals from this declaratory judgment, and the respondents cross-

⁶ The term "non-therapeutic abortion", as used in this brief, refers to any abortion performed for reasons unrelated to the health of the mother. A therapeutic abortion can be necessitated by physical as well as mental health considerations.

⁷ The Social Security Act, Title XIX, §1902, as added July 30, 1965, Pub. L. 89-97, 79 Stat. 344, 42 U.S.C.A. §1396 *et seq.* Future references to this Act, Sections 1396 and 1396a of which are completely set out in the Appendix to this brief, will be to the United States Code Annotated, or simply to "the Act".

⁸ Actually the injunction went beyond the individual plaintiffs, and enjoined enforcement of the abortion regulations throughout all of Allegheny County (60a).

⁹ The opinion of the three-judge court, Circuit Judge Weiss dissenting, rendered on May 3, 1974, is set forth in the appendix at 67a-117a.

appealed from the denial of declaratory relief with respect to the second and third trimesters of pregnancy.¹⁰ On July 21, 1975, the court of appeals *en banc*, with three judges dissenting, held that during the first two trimesters of pregnancy Pennsylvania's medical necessity requirement for abortions violated the requirements of Title XIX.¹¹ Having decided the case on statutory grounds the lower court properly did not address the constitutional question which was presented. *Hagans v. Lavine*, 415 U.S. 528 (1974). Petitioners sought, and were granted, a writ of certiorari from this Court to review that decision.¹²

¹⁰ The court of appeals' jurisdiction over this appeal was proper because the respondents did not appeal from the district court's refusal to award any injunctive relief. *Gerstein v. Coe*, 417 U.S. 279 (1974).

¹¹ The court of appeals' majority and dissenting opinions are fully set forth at 126a-185a. References to this opinion will be to both the Appendix and the reported opinion.

¹² The petition for a writ of certiorari was granted on July 6, 1976.

SUMMARY OF ARGUMENT

A. In Title XIX of the Social Security Act, Congress intended to give the states great latitude in the creation of their respective medicaid programs. Because of economic constraints, Pennsylvania has chosen to fund only the most critical medical services, and then only when those services are medically necessary to protect or maintain the recipient's health. This medical necessity requirement is not inconsistent with Title XIX, even when applied to abortions.

B. The lower court's holding in this case is contrary to the conclusion of every other circuit court that has addressed this question. The majority below erred by not considering Title XIX in its proper historical context. Notwithstanding this, its reasoning, that Congress did not intend to freeze the allowable services under Medicaid to those recognized in 1965—does not justify its conclusion that coverage for non-therapeutic abortions was made mandatory upon the states. This is especially true in view of the fact that such procedures were illegal in most states at the time Title XIX was enacted. Similarly, reasons which were found persuasive by other courts, such as other recent legislation disapproving abortions, and Congress's complete silence on the subject in Title XIX, should not have been ignored by the lower court. Finally, however characterized, the medical necessity requirement is applied uniformly throughout Pennsylvania's medicaid program and accordingly does not violate the equality provisions of Title XIX when applied to abortions.

ARGUMENT

A. Medicaid in Pennsylvania: An Overview

In 1965 Title XIX of the Social Security Act was enacted¹³ establishing the national Medicaid program. The overall design of the program has been likened to a "scheme of cooperative federalism", *King v. Smith*, 392 U.S. 309, 316 (1968); *New York Dept. of Social Services v. Dublino*, 413 U.S. 405 (1972); 134a; 523 F.2d 611, 616. The Act grants states that elect to participate, great latitude in the creation of their respective programs. Accordingly, in Title XIX Congress delineated only the broad parameters of a federal-state program that would, "... as far as practical under the conditions in [each] state ..." provide medical assistance to those "... whose income and resources are insufficient to meet the costs of necessary medical services ..." 42 U.S.C.A. §1396. However, the actual make-up of each state program was, to a large extent, left to the states. For example, decisions as to precisely which services to provide, the rate of payment for those services, as well as the definition and determination of eligibility, were all generally to be made within each state. 42 U.S.C.A. §1396a(a)(17).

Of course, there are certain general federal guidelines which the programs must meet. For example, in order for

¹³ 42 U.S.C.A. §1396 *et seq.*

a state to participate, its medicaid plan must provide services in each of the following general categories: (1) inpatient hospital services; (2) outpatient hospital services; (3) other laboratory and X-ray services; (4) skilled nursing facility services (as well as child health screening and treatment, and family planning services); and (5) general physicians services. 42 U.S.C.A. §1396a(a)(13)(B); 45 C.F.R. §§249.10(a)(1)(5). However, a state is not required to provide *every* service that may fall into each of these categories.¹⁴

Moreover, these five required medical services must be made equally available to all individuals who are "categorically" needy. 42 U.S.C.A. §1396a(a)(10)(A) and (B). The "categorically" needy group includes financially eligible families with dependent children as well as the aged, blind, and disabled. 42 U.S.C.A. §1396a(a)(10)(A); 45 C.F.R. §248.10(1). A participating state is given the option to extend medicaid to poor persons who do not meet the "categorically" needy guidelines.¹⁵ 42 U.S.C.A. §1396a(a)(10)(C). However, the state need not provide these individuals with services from each of the five required groups. 42 U.S.C.A. §1396a(a)(13)(C)(i), (ii),

¹⁴ 42 U.S.C.A. §1396d(a) defines "medical assistance" as "... payment of part or all of the cost of [the above] services ..." See also 42 U.S.C.A. §1396a(a)(17) which allows the state to establish reasonable standards regarding "... the extent of medical assistance under the plan which ... are consistent with the objectives of [Title XIX]."

¹⁵ This group is referred to as the "medically" needy and it includes persons who have enough income and resources to render them ineligible for financial aid, but who are nevertheless unable to meet the costs of necessary medical expenses. See 62 Pa. Stat. Ann. §442.1; and 45 C.F.R. §§248.10(a)(2).

but the services that are provided may not exceed in "... amount, duration or scope ..." the services that are provided to the "categorically" needy. 42 U.S.C.A. §1396a (a) (10) (13) (ii).¹⁶

Finally, each participating state must have a review mechanism to guard against the unnecessary utilization of medical services¹⁷ in its program. While the Act contains many other options available to the states, this is the general program outline that Congress prescribed in Title XIX.

Pennsylvania's medicaid plan,¹⁸ which was approved by the Secretary of Health, Education, and Welfare

¹⁶ The types of medical services which are optional with the states are: medical care recognized under state law and furnished by licensed practitioners; home health care services; private nursing services; clinic services; dental services; physical therapy; prescribed drugs, dentures or devices, other diagnostic or screening services, prosthetic services for individuals 65 years of age or over institutionalized for mental disease or tuberculosis; intermediate care facility services; certain inpatient psychiatric care for individuals under age 21; any other medical or remedial care which may be specified by the Secretary. 42 U.S.C.A. §1396d(6)-(17); 45 C.F.R. 249.10(a)(6)-(17).

¹⁷ 42 U.S.C.A. §1396a(a)(30) provides that a State plan must:

Provide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan (including but not limited to utilization review plans as provided for in section 1396b(i)(4) of this title) as may be necessary to safeguard against unnecessary utilization of such care and services and to assure that payments (including payments for any drugs provided under the plan) are not in excess of reasonable charges consistent with efficiency, economy, and quality of care.

¹⁸ The general regulations for the plan have been included in the appendix to this brief at 52. It should be noted that

(HEW), represents an attempt to rationally and equitably distribute its very limited medicaid resources. The need for medical services is far greater than the Commonwealth can accommodate, and the pressure mounts every year because of the incessant rise in the cost of medical services.¹⁹ Therefore, Pennsylvania was compelled to generally limit its medicaid program to cover only the most urgently needed medical services. Accordingly, many important medical services such as speech and physical therapy have been excluded from coverage under the program.

In any event, it is clear that under Title XIX a state may limit its medicaid program by not providing reimbursement for every recognized medical service.²⁰ With this in mind, and in view of the Commonwealth's financial constraints, Pennsylvania has limited the coverage of its medicaid program to those services which are medically necessary at the time of their utilization. For example, the services of a plastic surgeon are reimbursable under the program, however, these services will only be reim-

Pennsylvania's program covers both the categorically and medically needy—providing slightly different services to the latter group.

¹⁹ Pennsylvania alone has seen its medical assistance expenditures more than double since 1970—from \$150 million in 1970 to \$324 million last year. Act of Feb. 9, 1971, P.L. 803, No. 1A; Act of Mar. 4, 1971, P.L. 809, No. 3A; Act of June 30, 1975, P.L. —, No. 8A; Act of May 20, 1976, P.L. —, No. 5A.

²⁰ See note 14, *supra*. In this respect, it is also noteworthy that the equality provisions contained in the Act would hardly have been necessary if Congress intended that all recognized medical services be covered in a state's medicaid program. 42 U.S.C.A. §1396a(a)(10)(B)(i)(ii).

bursed when they are rendered for medical reasons.²¹ Similarly, only the most urgently needed dental services are covered by Pennsylvania's program. Services such as orthodontics and periodontics have been completely excluded from medicaid coverage in Pennsylvania.²²

Thus, the touchstone of Pennsylvania's medicaid program is medical necessity,²³ and this requirement does not run afoul of Title XIX, even when it is applied to abortions. The unambiguous language of Title XIX describes its primary goal as meeting the costs of "... necessary medical services" 42 U.S.C.A. §1396. Nevertheless, the respondents contend, and the court of appeals held, that the medical necessity requirement, as applied to abortions, violates Title XIX of the Social Security Act.

²¹ The Pennsylvania Medical Assistance Manual (M. A. Man.) Section 9411. 213 provides:

Payment is made for plastic surgery in connection with repair of accidental injury, the improvement of the functioning of a malformed body member, or for correction of a visible disfigurement which could materially affect the person's acceptance by society. Payment is not made for plastic surgery solely for cosmetic or beautifying purposes, such as rhenoplasty or mammoplasty.

²² The General Medical Assistance Regulations Section 9100 Part II E 5 refers to the program's goal in this respect as "... provid[ing] adequate, but not extravagant or superfluous care . . ."

²³ The General Medical Assistance Regulations provide:

"... the [medical assistance program] pays for those types of medical and allied services given in the home, office, clinic, or hospital, that are generally recognized as necessary treatment of illnesses." (Emphasis added.) M. A. Man. §9100 E1.

B. Title XIX of the Social Security Act Does Not Require That a Participating State Provide Medicaid Funds for the Costs of Non-Therapeutic Abortions

The Solicitor General has disagreed with the court of appeals in an *amicus curiae* brief filed on behalf of HEW, taking the position that Title XIX does not require that states pay for non-therapeutic abortions as part of their medicaid programs.²⁴ Therefore, the question is whether or not HEW's construction of the Act is unreasonable. *Udall v. Tallman*, 380 U.S. 1, 16 (1964). The petitioners contend that this construction is reasonable and therefore should have been adopted by the Court of Appeals.

1. By its holding that Title XIX requires payment for nontherapeutic abortions, the lower court stands alone among the circuit courts which have addressed this issue. *Roe v. Norton*, 522 F.2d 928 (2nd Cir. 1975), cert. granted *sub nom. Maher v. Roe*, U.S. , 96 S.Ct. 3219; *Roe v. Ferguson*, 515 F.2d 279 (6th Cir. 1975); *Doe v. Rose*, 499 F.2d 1112 (10th Cir. 1974). In reaching its contrary result, the lower court rejected the reasons which the other circuit courts found compelling. For example, the majority found unpersuasive the fact that nontherapeutic abortions were illegal in most states in 1965 when Title XIX was enacted²⁵ 151-2a, 523 F.2d 622.

²⁴ The court of appeals was, of course, aware of the views of HEW on this issue, but rejected them nonetheless. 146a n. 21a, 523 F.2d 620, 621 n. 22 (note 21a is numbered "22" in the bound edition of 523 F.2d.).

²⁵ In *Roe v. Wade*, 410 U.S. 113 (1973), at 118-9 n. 2 this Court noted that non-therapeutic abortions were completely illegal in more than 30 states at that time.

It is one thing to hold that as of 1965 Congress specifically prohibited or required Medicaid coverage for certain specific medical procedures. It is quite another matter to view the Act as having done neither but rather having left to the states the decision as to which services to cover and which not to cover. The latter is clearly the more flexible and reasonable view of this piece of social legislation.²⁹ More importantly this view is perfectly consistent with the language and purpose of Title XIX and avoids the awkward result of finding that Congress intended to require the states to fund a medical procedure that was a crime to perform in most of those states.

Similarly, the lower court was unimpressed by recent Congressional pronouncements on the subject of abortions. However, at least one other circuit court found this Congressional disapproval of abortion to be significant.³⁰ The

²⁹ The lower court correctly points out that Congress "... surely intended Medicaid to pay for drugs not legally marketable ... in 1965 which are subsequently found to be marketable" 152a, 523 F.2d 611, 623. However, this assumption only strengthens Pennsylvania's position. There is nothing in the construction advanced by the petitioners that would require reading Title XIX to preclude a state from constantly updating its inventory of allowable medical services. In fact quite the contrary is true—for just as petitioners assert that coverage for non-therapeutic abortions was not *required* by the Congress, so too do they recognize that such a procedure was not *precluded* from coverage under the Act.

³⁰ In *Roe v. Ferguson*, 515 F.2d 279 at 283 (6th Cir. 1975) on the basis of the prohibitions of federal funding for abortions contained in the Family Planning Services and Research Act of 1970, 84 Stat. 1508, 42 U.S.C.A. §300a, §§300a-6 as well as the Legal Services Corporation Act, 88 Stat. 383, 42 U.S.C.A. §§2996, 2996f (b)(8), the Court concluded that Congress would not mandate

majority below concluded that such an inference was unwarranted. Instead, the lower court found that Congress intended to require Medicaid coverage for non-therapeutic abortions because it failed to clearly prohibit such coverage:

"Congress could have proscribed payment for elective abortions [in title XIX] when it passed the Family Planning Services and Research Act of 1970, or in 1972 when it amended Title XIX, but it did not do so." 152a, 523 F.2d 611, 623.

It may be reasonable to infer from these Congressional actions on abortion, an intent to allow Medicaid payments for non-therapeutic abortions—it is not reasonable however, to infer an intent to make such payments mandatory.

3. The lower court determined that a basic principle underlying Title XIX was that the physicians' discretion in prescribing the proper treatment for a given medical condition be free of "[g]ratuitous interference", 149a, 523 F.2d 611, 621. According to the majority, once the state has determined that a medical condition requires medical treatment—"the proper treatment of such a condition ... must be left to the judgment of the attending physician" 146a, 523 F.2d 611, 620. Therefore, since Pennsylvania has determined that "... pregnancy is a condition for which medical treatment is 'necessary'" there is no basis in Title XIX "... for preventing an attending physician from choosing non-therapeutic abortion as the method for treating a pregnancy." *Id.* at 149a, 621.

Title XIX coverage for non-therapeutic abortion services *sub-silentio*.

This conclusion simply is not justified by its premise. Petitioners agree that an overriding concern of Congress in Title XIX was that states not interfere with the exercise of a physician's discretion. But certainly that discretion is not boundless. Physicians are trained to prescribe medical treatment for illnesses and other conditions which require medical attention. In the first instance, a physician is no more expert than a lay person in recommending non-therapeutic services—even if they are medical services. It is not part of the traditional role of a physician to recommend one life style over another, or the most economically sound means of providing for one's family. His role is to treat illness—not to provide social and economic counselling.

A physician is, no doubt, uniquely suited to determine if a desired medical procedure is medically feasible. For example, the decision to undergo purely beautifying cosmetic surgery normally would originate with the patient. And the reasons underlying such a decision would clearly not be medical. However, a physician would still be necessary to determine if the desired procedure is medically possible. But, even the lower court agreed that a state's medicaid program need not pay for every medical service that is feasible, 145a, 523 F.2d 611, 620. And when a woman decides to terminate her pregnancy for non-medical reasons the role of the physician is limited to deciding whether the procedure is medically feasible.

On the other hand when a physician recommends termination of a pregnancy for any medical reason, medicaid coverage is of course extended to pay the costs of that operation. It is entirely reasonable to require that a recommendation for treatment of any kind be predicated upon

the physician's evaluation of the patient's medical needs—as opposed to the patients social or economic needs. A physician is trained to advise on the proper treatment of medical needs, and interference with the exercise of his judgment in that regard would, in the words of the lower court, create a program of “medical obstruction” rather than medical assistance, 149a, 523 F.2d 611, 621. But the physician is not so uniquely qualified with respect to a patient's social and economic needs—and there appears to be no reason to accord his recommendations in those areas the same deference accorded his medical judgment with respect to the treatment of illnesses.

4. The lower court alternatively found that the petitioners' policy with respect to abortions violates section 1396a(a)(10)(B) and (C), 150a, 523 F.2d 611, 622.³¹ The essential requirements of these complicated sections of the Act are that the coverage provided under a state plan may not be less in “amount, duration, and scope” for one categorically needy individual, as compared to another categorically needy individual,³² or medically needy individual.³³ And, if it is provided at all, medical assistance must be equal among all medically needy individuals.³⁴

The court of appeals reasoned that “. . . since the ‘least voluntary method of treatment’ requirement which the regulations impose on pregnant women is imposed on

³¹ This section of Title XIX is completely set out in the appendix to this brief at 27-29.

³² 42 U.S.C.A. §§1396a(a)(10)(B)(i).

³³ 42 U.S.C.A. §§1396a(a)(10)(B)(ii).

³⁴ 42 U.S.C.A. §§1396a(a)(10)(C).

no other class of recipient",³⁵ those regulations violated the equality provisions of Title XIX described above. First, Pennsylvania's medicaid program provides equal benefits to all eligible recipients as is required by Title XIX—otherwise the plan could not have been approved by the Secretary of HEW. 42 U.S.C.A. §1396a(a)(10). All medical services must be medically necessary in order to qualify for medicaid reimbursement in Pennsylvania—and abortion is no exception. In the lower court's view this medical necessity requirement, was characterized as "... 'the least voluntary method of treatment' requirement." 150a, 523 Fed. 2d 611, 622. And this requirement resulted in unequal services being provided pregnant women who desire to abort their pregnancies for purely non-medical reasons. However, if this were correct, then what of the needy person who desires cosmetic surgery purely for beautifying purposes when compared to a person who must undergo the same surgery for medical reasons? Medicaid coverage is extended to the latter and not the former—yet the lower court's analysis would clearly require coverage for both. However, such broad medicaid coverage, if allowed, surely is not mandated by Title XIX. Whether termed 'medical necessity' or, as the lower court would have it, 'least voluntary' this requirement is imposed equally upon all medicaid recipients in Pennsylvania.

5. This court has repeatedly admonished against interpretations of the Social Security Act that hinge on remote implications of Congressional intent. *Dandridge v. Williams*, 397 U.S. 471 (1970); *Jefferson v. Hackney*, 406 U.S. 535, 545 (1971). In *New York State Department of*

³⁵ 150a, 523 F.2d 611, 622.

Social Services v. Dublino, 413 U.S. 405 (1972) the Court reversed the holding of a lower court with respect to its broad interpretation of the Social Security Act. In refusing to accept the Congressional mandate inferred by the district court, this Court noted that it "... has repeatedly refused to void state statutory programs, absent congressional intent to pre-empt them". *Id.* at 413. Moreover, Mr. Justice Powell, for the Court, pointed out that the plaintiffs in that case had failed to show the required "... clear manifestation of congressional intention ...". *Ibid.*

The Respondents' efforts in that respect have also missed the mark in this case. First, neither the respondents, nor the majority below, can point to any language in Title XIX or its legislative history that even mentions the subject of non-therapeutic abortions, much less requires that states fund them as part of their medicaid programs.³⁶ Secondly, the federal agency charged with administration of medicaid has taken the position that Title

³⁶ The respondents asserted in the lower court that coverage for non-therapeutic abortions was implicitly mandated as being either a "physicians' service", "inpatient service", "outpatient service", or a "family planning service". The lower court rejected these contentions. 144-5a, 523 F.2d 611, 620. The court noted that in order to adopt these views it would have to hold that all medical procedures legally within the practice of medicine were required to be covered by a state's medicaid program. As noted earlier, this view is inconsistent with the clear statutory language of title XIX. See e.g., 42 U.S.C.A. §1396, 42 U.S.C.A. §1396a(a)(17) and 45 C.F.R. 250.18 all of which explicitly recognize that states need not provide coverage for every conceivable medical service, but rather may reasonably limit coverage to the most necessary services.

Argument

XIX does not require payment for non-therapeutic abortions. This standing alone, is very persuasive in favor of the view advanced by petitioners. *Rosado v. Wyman*, 397 U.S. 406 (1969), *Youakim v. Miller*, U.S. , 96 S.Ct. 1399, 1402 (1976); *Northern Cheyenne Tribe v. Hallowbrest*, U.S. , 96 S.Ct. 1795, 1799 (1976). Third, Congress has recently on two occasions specifically disapproved of federal funding for abortions performed or obtained in connection with other federal programs.³⁷ Fourth, when Title XIX was enacted non-therapeutic abortions were illegal in most states. Finally, it is unreasonable to assume that, in an area as controversial as abortions, Congress would impose such a requirement on virtually every state by implication and without any debate whatsoever.

These are compelling reasons for rejecting the contention that Title XIX mandates state funding for non-therapeutic abortions. Nevertheless, respondents demand that non-therapeutic abortions be treated differently than all other medical services covered by Pennsylvania's medical assistance program. Respondents' view would require the state to allocate its limited medical assistance resources with a blind eye—for example to use funds for a medically unnecessary abortion while more desperate medical needs of the poor are neglected. This was not the intent of Congress. Accordingly, the decision of the lower court should be reversed.

³⁷ See n. 29, *supra*, as well as its accompanying text.

Argument

CONCLUSION

On the basis of the foregoing arguments and authorities the petitioners seek reversal of the decision of the lower court.

Respectfully submitted,
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SUPPLEMENTAL APPENDIX**STATUTES INVOLVED****SUBCHAPTER XIX—GRANTS TO STATES FOR
MEDICAL ASSISTANCE PROGRAMS****§1396. Authorization of appropriations**

For the purpose of enabling each State, as far as practicable under the conditions in such State, to furnish (1) medical assistance on behalf of families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services, and (2) rehabilitation and other services to help such families and individuals attain or retain capability for independence or self-care, there is hereby authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this subchapter. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary of Health, Education, and Welfare, State plans for medical assistance. Aug. 14, 1935, c. 531, Title XIX, §1901, as added July 30, 1965, Pub. L. 89-97, Title I, §121(a), 79 Stat. 343, and amended Dec. 31, 1973, Pub. L. 93-233, §13(a)(1), 87 Stat. 960.

§1396a. State plans for medical assistance—Contents

(a) A State plan for medical assistance must—

(1) provide that it shall be in effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them;

(2) provide for financial participation by the State equal to not less than 40 per centum of the non-Federal share of the expenditures under the plan with respect to which payments under section 1396b of this title are authorized by this subchapter; and, effective July 1, 1969, provide for financial participation by the State equal to all of such non-Federal share or provide for distribution of funds from Federal or State sources, for carrying out the State plan, on an equalization or other basis which will assure that the lack of adequate funds from local sources will not result in lowering the amount, duration, scope, or quality of care and services available under the plan;

(3) provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for medical assistance under the plan is denied or is not acted upon with reasonable promptness;

(4) provide (A) such methods of administration (including methods relating to the establishment and maintenance of personnel standards on a merit basis, except that the Secretary shall exercise no authority with respect to the selection, tenure of office, and compensation of any individual employed in accordance with such methods, and including provision for utilization of professional medical personnel in the administration and, where administered locally, supervision of administration of the plan) as are

Statutes Involved

found by the Secretary to be necessary for the proper and efficient operation of the plan, and (B) for the training and effective use of paid subprofessional staff with particular emphasis on the full-time or part-time employment of recipients and other persons of low income, as community service aides, in the administration of the plan and for the use of nonpaid or partially paid volunteers in a social service volunteer program in providing services to applicants and recipients and in assisting any advisory committees established by the State agency;

(5) either provide for the establishment or designation of a single State agency to administer or to supervise the administration of the plan; or provide for the establishment or designation of a single State agency to administer or to supervise the administration of the plan, except that the determination of eligibility for medical assistance under the plan shall be made by the State or local agency administering the State plan approved under subchapter I or XVI of this chapter (insofar as it relates to the aged) if the State is eligible to participate in the State plan program established under subchapter XVI of this chapter, or by the agency or agencies administering the supplemental security income program established under subchapter XVI or the State plan approved under part A of subchapter IV of this chapter if the State is not eligible to participate in the State plan program established under subchapter XVI of this chapter;

(6) provide that the State agency will make such reports, in such form and containing such information, as the Secretary may from time to time require, and comply with such provisions as the Secretary may from time to

Statutes Involved

time find necessary to assure the correctness and verification of such reports;

(7) provide safeguards which restrict the use or disclosure of information concerning applicants and recipients to purposes directly connected with the administration of the plan;

(8) provide that all individuals wishing to make application for medical assistance under the plan shall have opportunity to do so, and that such assistance shall be furnished with reasonable promptness to all eligible individuals;

(9) provide—

(A) that the State health agency, or other appropriate State medical agency (whichever is utilized by the Secretary for the purpose specified in the first sentence of section 1395aa(a) of this title), shall be responsible for establishing and maintaining health standards for private or public institutions in which recipients of medical assistance under the plan may receive care or services, and

(B) for the establishment or designation of a State authority or authorities which shall be responsible for establishing and maintaining standards, other than those relating to health, for such institutions;

(10) provide—

(A) for making medical assistance available to all individuals receiving aid or assistance under any plan of the State approved under subchapter I, X, XIV, or XVI, or part A of subchapter IV of this chapter, or with respect to whom supplemental secu-

Statutes Involved

rity income benefits are being paid under subchapter XVI of this chapter;

(B) that the medical assistance made available to any individual described in clause (A)—

(i) shall not be less in amount, duration, or scope than the medical assistance made available to any other such individual, and

(ii) shall not be less in amount, duration, or scope than the medical assistance made available to individuals not described in clause A; and

(C) if medical assistance is included for any group of individuals who are not described in clause (A) and who do not meet the income and resources requirements of the appropriate State plan, or the supplemental security income program under subchapter XVI of this chapter, as the case may be, as determined in accordance with standards prescribed by the Secretary—

(i) for making medical assistance available to all individuals who would, except for income and resources, be eligible for aid or assistance under any such State plan or to have paid with respect to them supplemental security income benefits under subchapter XVI of this chapter, and who have insufficient (as determined in accordance with comparable standards) income and resources to meet the costs of necessary medical and remedial care and services, and

(ii) that the medical assistance made available to all individuals not described in clause (A) shall be equal in amount, duration, and scope;

Statutes Involved

except that (I) the making available of the services described in paragraph (4), (14), or (16) of section 1396d (a) of this title to individuals meeting the age requirements prescribed therein shall not, by reason of this paragraph (10), require the making available of any such services, or the making available of such services of the same amount, duration, and scope, to individuals of any other ages, (II) the making available of supplementary medical insurance benefits under part B of subchapter XVIII of this chapter to individuals eligible therefor (either pursuant to an agreement entered into under section 1395v of this title or by reason of the payment of premiums under such subchapter by the State agency on behalf of such individuals), or provision for meeting part or all of the cost of deductibles, cost sharing, or similar charges under part B of subchapter XVIII of this chapter for individuals eligible for benefits under such part, shall not by reason of this paragraph (10), require the making available of any such benefits, or the making available of services of the same amount, duration, and scope, to any other individuals, and (III) the making available of medical assistance equal in amount, duration, and scope to the medical assistance made available to individuals described in clause (A) to any classification of individuals approved by the Secretary, with respect to whom there is being paid, or who are eligible, or would be eligible if they were not in a medical institution, to have paid with respect to them, a State supplementary payment shall not, by reason of this paragraph (10), require the making available of any such assistance, or the making available of such assistance of the same amount, duration, and scope, to any other individuals not described in clause (A);

(11) (A) provide for entering into cooperative arrangements with the State agencies responsible for administering or supervising the administration of health services and vocational rehabilitation services in the State looking toward maximum utilization of such services in the provision of medical assistance under the plan, and (B) effective July 1, 1969, provide, to the extent prescribed by the Secretary, for entering into agreements, with any agency, institution, or organization receiving payments for part or all of the cost of plans or projects under subchapter V of this chapter, (i) providing for utilizing such agency, institution, or organization in furnishing care and services which are available under such plan or project under subchapter V of this chapter and which are included in the State plan approved under this section and (ii) making such provision as may be appropriate for reimbursing such agency, institution, or organization for the cost of any such care and services furnished any individual for which payment would otherwise be made to the State with respect to him under section 1396b of this title;

(12) provide that, in determining whether an individual is blind, there shall be an examination by a physician skilled in the diseases of the eye or by an optometrist, whichever the individual may select;

(13) provide—

(A) (i) for the inclusion of some institutional and some noninstitutional care and services, and

(ii) for the inclusion of home health services for any individual who, under the State plan, is entitled to skilled nursing facility services, and

(B) in the case of individuals receiving aid or assistance under any plan of the State approved under subchapter I, X, XIV, or XVI, or part A of subchapter IV of this chapter, or with respect to whom supplemental security income benefits are being paid under subchapter XVI of this chapter, for the inclusion of at least the care and services listed in clauses (1) through (5) of section 1396d(a) of this title, and

(C) in the case of individuals not included under subparagraph (B) for the inclusion of at least—

(i) the care and services listed in clauses (1) through (5) of section 1396d(a) of this title or

(ii) (I) the care and services listed in any 7 of the clauses numbered (1) through (16) of such section and (II) in the event the care and services provided under the State plan include hospital or skilled nursing facility services, physicians' services to an individual in a hospital or skilled nursing facility during any period he is receiving hospital services from such hospital or skilled nursing facility services from such facility, and

(D) for payment of the reasonable cost of inpatient hospital services provided under the plan, as determined in accordance with methods and standards, consistent with section 1320a-1 of this title, which shall be developed by the State and reviewed and approved by the Secretary and (after notice of approval by the Secretary) included in the plan, except that the reasonable cost of any such services as

Statutes Involved

determined under such methods and standards shall not exceed the amount which would be determined under section 1395x(v) of this title as the reasonable cost of such services for purposes of subchapter XVIII of this chapter; and

(E) effective July 1, 1976, for payment of the skilled nursing facility and intermediate care facility services provided under the plan on a reasonable cost related basis, as determined in accordance with methods and standards which shall be developed by the State on the basis of cost-finding methods approved and verified by the Secretary;

(14) effective January 1, 1973, provide that—

(A) in the case of individuals receiving aid or assistance under any plan of the State approved under subchapter I, X, XIV, or XVI, or part A of subchapter IV of this chapter, or with respect to whom supplemental security income benefits are being paid under subchapter XVI of this chapter, or who meet the income and resources requirements of the appropriate State plan, or the supplemental security income program under subchapter XVI of this chapter, as the case may be, and individuals with respect to whom there is being paid, or who are eligible, or would be eligible if they were not in a medical institution, to have paid with respect to them, a State supplementary payment and are eligible for medical assistance equal in amount, duration, and scope to the medical assistance made available to individuals described in paragraph (10) (A) —

(i) no enrollment fee, premium, or similar charge, and no deduction, cost sharing, or similar

Statutes Involved

charge with respect to the care and services listed in clauses (1) through (5) and (7) of section 1396d (a) of this title, will be imposed under the plan, and

(ii) any deduction, cost sharing, or similar charge imposed under the plan with respect to other care and services will be nominal in amount (as determined in accordance with standards approved by the Secretary and included in the plan), and

(B) with respect to individuals (other than individuals with respect to whom there is being paid, or who are eligible or would be eligible if they were not in a medical institution, to have paid with respect to them, a State supplementary payment and are eligible for medical assistance equal in amount, duration, and scope to the medical assistance made available to individuals described in paragraph (10) (A)) who are not receiving aid or assistance under any such State plan and with respect to whom supplemental security income benefits are not being paid under subchapter XVI of this chapter and who do not meet the income and resources requirements of the appropriate State plan, or the supplemental security income program under subchapter XVI of this chapter, as the case may be—

(i) there may be imposed an enrollment fee, premium, or similar charge which (as determined in accordance with standards prescribed by the Secretary) is related to the individual's income, and

(ii) any deductible, cost-sharing, or similar charge imposed under the plan will be nominal;

(15) in the case of eligible individuals 65 years of age or older who are covered by either or both of the insurance programs established by subchapter XVIII of this chapter, provide where, under the plan, all of any deductible, cost sharing, or similar charge imposed with respect to such individual under the insurance program established by such subchapter is not met, the portion thereof which is met shall be determined on a basis reasonably related (as determined in accordance with standards approved by the Secretary and included in the plan) to such individual's income or his income and resources;

(16) provide for inclusion, to the extent required by regulations prescribed by the Secretary, of provisions (conforming to such regulations) with respect to the furnishing of medical assistance under the plan to individuals who are residents of the State but are absent therefrom;

(17) include reasonable standards (which shall be comparable for all groups and may, in accordance with standards prescribed by the Secretary, differ with respect to income levels, but only in the case of applicants or recipients of assistance under the plan who are not receiving aid or assistance under any plan of the State approved under subchapter I, X, XIV, or XVI, or part A of subchapter IV of this chapter, and with respect to whom supplemental security income benefits are not being paid under subchapter XVI of this chapter based on the variations between shelter costs in urban areas and in rural areas) for determining eligibility for and the extent of medical assistance under the plan which (A) are consistent with the objectives of this subchapter, (B) provide for taking into account only such income and resources as are, as determined in accordance with standards pre-

scribed by the Secretary, available to the applicant or recipient and (in the case of any applicant or recipient who would, except for income and resources, be eligible for aid or assistance in the form of money payments under any plan of the State approved under subchapter I, X, XIV, or XVI, or part A of subchapter IV, or to have paid with respect to him supplemental security income benefits under subchapter XVI of this chapter as would not be disregarded (or set aside for future needs) in determining his eligibility for such aid, assistance, or benefits, (C) provide for reasonable evaluation of any such income or resources, and (D) do not take into account the financial responsibility of any individual for any applicant or recipient of assistance under the plan unless such applicant or recipient is such individual's spouse or such individual's child who is under age 21 or (with respect to States eligible to participate in the State program established under subchapter XVI of this chapter), is blind or permanently and totally disabled, or is blind or disabled as defined in section 1382c of this title (with respect to States which are not eligible to participate in such program); and provide for flexibility in the application of such standards with respect to income by taking into account, except to the extent prescribed by the Secretary, the costs (whether in the form of insurance premiums or otherwise) incurred for medical care or for any other type of remedial care recognized under State law;

(18) provide that no lien may be imposed against the property of any individual prior to his death on account of medical assistance paid or to be paid on his behalf under the plan (except pursuant to the judgment of a court on account of benefits incorrectly paid on behalf of such

individual), and that there shall be no adjustment or recovery (except, in the case of an individual who was 65 years of age or older when he received such assistance, from his estate, and then only after the death of his surviving spouse, if any, and only at a time when he has no surviving child who is under age 21 or (with respect to States eligible to participate in the State program established under subchapter XVI of this chapter), is blind or permanently and totally disabled, or is blind or disabled as defined in section 1382c of this title (with respect to States which are not eligible to participate in such program)) of any medical assistance correctly paid on behalf of such individual under the plan;

(19) provide such safeguards as may be necessary to assure that eligibility for care and services under the plan will be determined, and such care and services will be provided in a manner consistent with simplicity of administration and the best interests of the recipients;

(20) if the State plan includes medical assistance in behalf of individuals 65 years of age or older who are patients in institutions for mental diseases—

(A) provide for having in effect such agreements or other arrangements with State authorities concerned with mental diseases, and, where appropriate, with such institutions, as may be necessary for carrying out the State plan, including arrangements for joint planning and for development of alternate methods of care, arrangements providing assurance of immediate readmittance to institutions where needed for individuals under alternate plans of care, and arrangements providing for access to patients and

facilities, for furnishing information, and for making reports;

(B) provide for an individual plan for each such patient to assure that the institutional care provided to him is in his best interests, including, to that end, assurances that there will be initial and periodic review of his medical and other needs, that he will be given appropriate medical treatment within the institution, and that there will be a periodical determination of his need for continued treatment in the institution;

(C) provide for the development of alternate plans of care, making maximum utilization of available resources, for recipients 65 years of age or older who would otherwise need care in such institutions, including appropriate medical treatment and other aid or assistance; for services referred to in section 303(a)(4)(A)(i) and (ii), section 803(a)(1)(A)(i) and (ii) of this title or section 1383(a)(4)(A)(i) and (ii) of this title which are appropriate for such recipients and for such patients; and for methods of administration necessary to assure that the responsibilities of the State agency under the State plan with respect to such recipients and such patients will be effectively carried out; and

(D) provide methods of determining the reasonable cost of institutional care for such patients;

(21) if the State plan includes medical assistance in behalf of individuals 65 years of age or older who are patients in public institutions for mental diseases, show that the State is making satisfactory progress toward de-

veloping and implementing a comprehensive mental health program, including provision for utilization of community mental health centers, nursing facilities, and other alternatives to care in public institutions for mental diseases;

(22) include descriptions of (A) the kinds and numbers of professional medical personnel and supporting staff that will be used in the administration of the plan and of the responsibilities they will have, (B) the standards, for private or public institutions in which recipients of medical assistance under the plan may receive care or services, that will be utilized by the State authority or authorities responsible for establishing and maintaining such standards, (C) the cooperative arrangements with State health agencies and State vocational rehabilitation agencies entered into with a view to maximum utilization of and coordination of the provision of medical assistance with the services administered or supervised by such agencies, and (D) other standards and methods that the State will use to assure that medical or remedial care and services provided to recipients of medical assistance are of high quality;

(23) except in the case of Puerto Rico, the Virgin Islands, and Guam, provide that any individual eligible for medical assistance (including drugs) may obtain such assistance from any institution, agency, community pharmacy, or person, qualified to perform the service or services required (including an organization which provides such services, or arranges for their availability, on a prepayment basis), who undertakes to provide him such services, and a State plan shall not be deemed to be out of compliance with the requirements of this paragraph or paragraph (1) or (10) solely by reason of the fact that

the State (or any political subdivision thereof) has entered into a contract with an organization which has agreed to provide care and services in addition to those offered under the State plan to individuals eligible for medical assistance who reside in the geographic area served by such organization and who elect to obtain such care and services from such organization; [as amended July 1, 1975, Pub. L. 94-48, 89 Stat. 247]

(24) effective July 1, 1969, provide for consultative services by health agencies and other appropriate agencies of the State to hospitals, nursing facilities, home health agencies, clinics, laboratories, and such other institutions as the Secretary may specify in order to assist them (A) to qualify for payments under this chapter, (B) to establish and maintain such fiscal records as may be necessary for the proper and efficient administration of this chapter, and (C) to provide information needed to determine payments due under this chapter on account of care and services furnished to individuals;

(25) provide (A) that the State or local agency administering such plan will take all reasonable measures to ascertain the legal liability of third parties to pay for care and services (available under the plan) arising out of injury, disease, or disability, (B) that where the State or local agency knows that a third party has such a legal liability such agency will treat such legal liability as a resource of the individual on whose behalf the care and services are made available for purposes of paragraph (17) (B), and (C) that in any case where such a legal liability is found to exist after medical assistance has been made available on behalf of the individual, the State or

Statutes Involved

local agency will seek reimbursement for such assistance to the extent of such legal liability;

(26) effective July 1, 1969, provide (A) for a regular program of medical review (including medical evaluation) of each patient's need for skilled nursing facility care or (in the case of individuals who are eligible therefor under the State plan) need for care in a mental hospital, a written plan of care, and, where applicable, a plan of rehabilitation prior to admission to a skilled nursing facility; (B) for periodic inspections to be made in all skilled nursing facilities and mental institutions (if the State plan includes care in such institutions) within the State by one or more medical review teams (composed of physicians and other appropriate health and social service personnel) of (i) the care being provided in such nursing facilities (and mental institutions, if care therein is provided under the State plan) to persons receiving assistance under the State plan, (ii) with respect to each of the patients receiving such care, the adequacy of the services available in particular nursing facilities (or institutions) to meet the current health needs and promote the maximum physical well-being of patients receiving care in such facilities (or institutions), (iii) the necessity and desirability of the continued placement of such patients in such nursing facilities (or institutions), and (iv) the feasibility of meeting their health care needs through alternative institutional or noninstitutional services; and (C) for the making by such team or teams of full and complete reports of the findings resulting from such inspections together with any recommendations to the State agency administering or supervising the administration of the State plan;

Statutes Involved

(27) provide for agreements with every person or institution providing services under the State plan under which such person or institution agrees (A) to keep such records as are necessary fully to disclose the extent of the services provided to individuals receiving assistance under the State plan, and (B) to furnish the State agency with such information, regarding any payments claimed by such person or institution for providing services under the State plan, as the State agency may from time to time request;

(28) provide that any skilled nursing facility receiving payments under such plan must satisfy all of the requirements contained in section 1395x(j) of this title, except that the exclusion contained therein with respect to institutions which are primarily for the care and treatment of mental diseases and tuberculosis shall not apply for purposes of this subchapter; [as amended, Oct. 30, 1972, Pub. L. 92-603, 86 Stat. 1424]

(29) include a State program which meets the requirements set forth in section 1396g of this title, for the licensing of administrators of nursing homes;

(30) provide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan (including but not limited to utilization review plans as provided for in section 1396b (i) (4) of this title) as may be necessary to safeguard against unnecessary utilization of such care and services and to assure that payments (including payments for any drugs provided under the plan) are not in excess of reasonable charges consistent with efficiency, economy, and quality of care;

Statutes Involved

(31) provide (A) for a regular program of independent professional review (including medical evaluation of each patient's need for intermediate care) and a written plan of service prior to admission or authorization of benefits in an intermediate care facility as determined under regulations of the Secretary; (B) for periodic on-site inspections to be made in all such intermediate care facilities (if the State plan includes care in such institutions) within the State by one or more independent professional review teams (composed of physicians or registered nurses and other appropriate health and social service personnel) of (i) the care being provided in such intermediate care facilities to persons receiving assistance under the State plan, (ii) with respect to each of the patients receiving such care, the adequacy of the services available in particular intermediate care facilities to meet the current health needs and promote the maximum physical well-being of patients receiving care in such facilities, (iii) the necessity and desirability of the continued placement of such patients in such facilities, and (iv) the feasibility of meeting their health care needs through alternative institutional or non-institutional services; and (C) for the making by such team or teams of full and complete reports of the findings resulting from such inspections, together with any recommendations to the State agency administering or supervising the administration of the State plan;

(32) provide that no payment under the plan for any care or service provided to an individual by a physician, dentist, or other individual practitioner shall be made to anyone other than such individual or such physician, dentist, or practitioner, except that payment may be made (A) to the employer of such physician, dentist,

Statutes Involved

or practitioner if such physician, dentist, or practitioner is required as a condition of his employment to turn over his fee for such care or service to his employer, or (B) (where the care or service was provided in a hospital, clinic, or other facility) to the facility in which the care or service was provided if there is a contractual arrangement between such physician, dentist, or practitioner and such facility under which such facility submits the bill for such care or service;

(33) provide—

(A) that the State health agency, or other appropriate State medical agency, shall be responsible for establishing a plan, consistent with regulations prescribed by the Secretary, for the review by appropriate professional health personnel of the appropriateness and quality of care and services furnished to recipients of medical assistance under the plan in order to provide guidance with respect thereto in the administration of the plan to the State agency established or designated pursuant to paragraph (5) and, where applicable, to the State agency described in the penultimate sentence of this subsection; and

(B) that the State or local agency utilized by the Secretary for the purpose specified in the first sentence of section 1395aa (a) of this title, or, if such agency is not the State agency which is responsible for licensing health institutions, the State agency responsible for such licensing, will perform for the State agency administering or supervising the administration of the plan approved under this title the function of determining whether institutions and

Statutes Involved

agencies meet the requirements for participation in the program under such plan;

(34) provide that in the case of any individual who has been determined to be eligible for medical assistance under the plan, such assistance will be made available to him for care and services included under the plan and furnished in or after the third month before the month in which he made application (or application was made on his behalf in the case of a deceased individual) for such assistance if such individual was (or upon application would have been) eligible for such assistance at the time such care and services were furnished;

(35) effective January 1, 1973, provide that any intermediate care facility or who is the owner (in whole or in part) of any mortgage, deed of trust, note, or other obligation secured (in whole or in part) by such intermediate care facility or any of the property or assets of such intermediate care facility receiving payments under such plan must supply to the licensing agency of the State full and complete information as to the identity (A) of each person having (directly or indirectly) an ownership interest of 10 per centum or more in such intermediate care facility, (B) in case an intermediate care facility is organized as a corporation, of each officer and director of the corporation, and (C) in case an intermediate care facility is organized as a partnership, of each partner; and promptly report any changes which would affect the current accuracy of the information so required to be supplied; and

(36) provide that within 90 days following the completion of each survey of any health care facility,

Statutes Involved

laboratory, agency, clinic, or organization, by the appropriate State agency described in paragraph (9), such agency shall (in accordance with regulations of the Secretary) make public in readily available form and place the pertinent findings of each such survey relating to the compliance of each such health care facility, laboratory, clinic, agency, or organization with (A) the statutory conditions of participation imposed under this title, and (B) the major additional conditions which the Secretary finds necessary in the interest of health and safety of individuals who are furnished care or services by any such facility, laboratory, clinic, agency, or organization.

Notwithstanding paragraph (5), if on January 1, 1965, and on the date on which a State submits its plan for approval under this subchapter, the State agency which administered or supervised the administration of the plan of such State approved under subchapter X of this chapter (or subchapter XVI of this chapter, insofar as it relates to the blind) was different from the State agency which administered or supervised the administration of the State plan approved under subchapter I of this chapter (or subchapter XVI of this chapter, insofar as it relates to the aged), the State agency which administered or supervised the administration of such plan approved under subchapter X of this chapter (or subchapter XVI of this chapter, insofar as it relates to the blind) may be designated to administer or supervise the administration of the portion of the State plan for medical assistance which relates to blind individuals and a different State agency may be established or designated to administer or supervise the administration of the rest of the State plan for medical assistance; and in such case the part of the plan which each such agency

administers, or the administration of which each such agency supervises, shall be regarded as a separate plan for purposes of this subchapter (except for purposes of paragraph (10)). For purposes of paragraphs (9) (A), (29), (31), and (33), and of section 1396b(i) (4) of this title, the terms "skilled nursing facility" and "nursing facility" do not include a Christian Science sanatorium operated, or listed and certified, by the First Church of Christ, Scientist, Boston, Massachusetts.

For purposes of paragraph (10) any individual who, for the month of August 1972, was eligible for or receiving aid or assistance under a State plan approved under subchapter I, X, XIV, or XVI of this chapter, or part A of subchapter IV of this chapter and who for such month was entitled to monthly insurance benefits under subchapter II of this chapter shall for purposes of this subchapter only be deemed to be eligible for financial aid or assistance for any month thereafter if such individual would have been eligible for financial aid or assistance for such month had the increase in monthly insurance benefits under subchapter II of this chapter resulting from enactment of Public Law 92-336 not been applicable to such individual. [as amended, July 1, 1975, Pub. L. 94-48, 89 Stat. 247]

Approval by Secretary

(b) The Secretary shall approve any plan which fulfills the conditions specified in subsection (a) of this section, except that he shall not approve any plan which imposes, as a condition of eligibility for medical assistance under the plan—

- (1) an age requirement of more than 65 years;

or

(2) effective July 1, 1967, any age requirement which excludes any individual who has not attained the age of 21 and is or would, except for the provisions of section 606(a) (2) of this title, be a dependent child under part A of subchapter IV of this chapter; or

(3) any residence requirement which excludes any individual who resides in the State; or

(4) any citizenship requirement which excludes any citizen of the United States.

Same; reduction of aid or assistance under State plans
under other subchapters

(c) Notwithstanding subsection (b) of this section, the Secretary shall not approve any State plan for medical assistance if he determines that the approval and operation of the plan will result in a reduction in aid or assistance in the form of money payments (other than so much, if any, of the aid or assistance in such form as was, immediately prior to the effective date of the State plan under this subchapter, attributable to medical needs) provided for eligible individuals under a plan of such State approved under subchapters I, X, XIV, or XVI of this chapter, or part A of subchapter IV of this chapter.

(d) Repealed. Pub.L. 92-603, Title II, §231, Oct. 30, 1972, 86 Stat. 1410.

Continued eligibility of families determined ineligible because of income and resources or hours of work limitations
of plan

(e) Notwithstanding any other provision of this subchapter, effective January 1, 1974, each State plan approved under this subchapter must provide that each family which was receiving aid pursuant to a plan of the State approved under part A of subchapter IV of this chapter in at least 3 of the 6 months immediately preceding the month in which such family became ineligible for such aid because of increased hours of, or increased income from, employment, shall, while a member of such family is employed, remain eligible for assistance under the plan approved under this subchapter (as though the family was receiving aid under the plan approved under part A of subchapter IV of this chapter) for 4 calendar months beginning with the month in which such family became ineligible for aid under the plan approved under part A of subchapter IV of this chapter because of income and resources or hours of work limitations contained in such plan.

Effective date of State plan as determinative of duty of State to provide medical assistance to aged, blind, or disabled individuals

(f) Notwithstanding any other provision of this subchapter, except as provided in subsection (e) of this section, no State not eligible to participate in the State plan program established under subchapter XVI of this chapter shall be required to provide medical assistance to any aged, blind, or disabled individual (within the meaning of subchapter XVI of this chapter) for any month unless such State would be (or would have been) required to provide medical assistance to such individual for such month had its plan for medical assistance approved under this sub-

chapter and in effect on January 1, 1972, been in effect in such month, except that for this purpose any such individual shall be deemed eligible for medical assistance under such State plan if (in addition to meeting such other requirements as are or may be imposed under the State plan) the income of any such individual as determined in accordance with section 1396b(f) of this title (after deducting any supplemental security income payment and State supplementary payment made with respect to such individual, and incurred expenses for medical care as recognized under State law) is not in excess of the standard for medical assistance established under the State plan as in effect on January 1, 1972. In States which provide medical assistance to individuals pursuant to clause (10) (C) of subsection (a) of this section, an individual who is eligible for medical assistance by reason of the requirements of this section concerning the deduction of incurred medical expenses from income shall be considered an individual eligible for medical assistance under clause (10) (A) of that subsection if that individual is, or is eligible to be (1) an individual with respect to whom there is payable a State supplementary payment on the basis of which similarly situated individuals are eligible to receive medical assistance equal in amount, duration, and scope to that provided to individuals eligible under clause (10) (A), or (2) an eligible individual or eligible spouse, as defined in subchapter XVI of this chapter, with respect to whom supplemental security income benefits are payable; otherwise that individual shall be considered to be an individual eligible for medical assistance under clause (10) (C) of that subsection. In States which do not provide medical assistance to individuals pursuant to clause (10) (C) of that subsec-

tion, an individual who is eligible for medical assistance by reason of the requirements of this section concerning the deduction of incurred medical expenses from income shall be considered an individual eligible for medical assistance under clause (10) (A) of that subsection.

Aug. 14, 1935, c. 531, Title XIX, §1902, as added July 30, 1965, Pub.L. 89-97, Title I, §121 (a), 79 Stat. 344, and amended Jan. 2, 1968, Pub.L. 90-248, Title II, §§210 (a) (6), 223 (a), 224 (a), (c) (1), 227 (a), 228 (a), 229 (a), 231, 234 (a), 235 (a), 236 (a), 237, 238, 241 (f) (1)-(4), Title III, §302 (b), 81 Stat. 896, 901-906, 908, 911, 917, 929; Aug. 9, 1969, Pub.L. 91-56, §2 (c), (d), 83 Stat. 99; Dec. 28, 1971, Pub.L. 92-223, §4 (b), 85 Stat. 809; Oct. 30, 1972, Pub.L. 92-603, Title II, §§208 (a), 209 (a), (b) (1), 221 (c) (5), 231, 232 (a), 236 (b), 237 (a) (2), 239 (a), (b), 240, 246 (a), 249 (a), 255 (a), 268 (a), 274 (a), 278 (a) (18), (19), (b) (14), 298, 299A, 299D (b), 86 Stat. 1381, 1389, 1410, 1415-1418, 1424, 1426, 1446, 1450, 1452, 1453, 1460, 1462; Dec. 31, 1973, Pub.L. 93-233, §§13 (a) (2)-(10), 18 (o)-(q), (x) (1)-(4), 87 Stat. 960-963, 971, 972; Aug. 7, 1974, Pub.L. 93-368, §9 (a), 88 Stat. 422.

Consent to suit and waiver of immunity by State

(g) Notwithstanding any other provision of this subchapter, a State plan for medical assistance must include a consent by the State to the exercise of the judicial power of the United States in any suit brought against the State or a State officer by or on behalf of any provider of services (as defined in section 1395x (u) of this title) with respect to the application of subsection (a) (13) (D) of this section to services furnished under such plan after

June 30, 1975, and a waiver by the State of any immunity from such a suit conferred by the 11th Amendment to the Constitution or otherwise. [As amended Dec. 31, 1975, Pub.L. 94-182, Title I, §111 (a), 89 Stat. 1054.]

[Note: 42 U.S.C. §1396 (b) through §1396 (i) omitted.]

REGULATION INVOLVED**9100 MEDICAL ASSISTANCE (MA)—GENERAL****TABLE OF CONTENTS****PART I—ADMINISTRATION OF MEDICAL CARE PROGRAMS****PART II—MEDICAL CARE PROGRAMS FOR CATEGORICALLY NEEDY PERSONS AND FOR SCHOOL CHILDREN WHO ARE ONLY MEDICALLY NEEDY—GENERAL POLICIES****A. PURPOSE**

1. For Categorically Needy Persons
2. For School Children

B. METHOD OF PAYMENT**C. ELIGIBILITY FOR CARE****D. PROFESSIONAL PARTICIPATION****E. SERVICES PAID FOR**

1. Summary
2. Physicians' Services
3. Pharmaceutical Services
4. Clinic Services
5. Dental Services
6. Ambulance Services

7. Nursing Care in the Home
8. Inpatient Hospital Care
9. Hospital-Home Care
10. Skilled Nursing Care
11. Intermediate Care
12. Care in a Mental Institution
13. Medical-Social Services

F. COOPERATION BETWEEN PRACTITIONER AND PUBLIC ASSISTANCE STAFF**PART III—MEDICAL CARE PROGRAM FOR PERSONS WHO ARE ONLY MEDICALLY NEEDY**

1. Inpatient Hospital Care
2. Hospital-Home Care
3. Nursing Care in the Home
4. Skilled Nursing Care
5. Intermediate Care
6. Care in a Mental Institution
7. Medical-Social Services
8. Physician's Services
9. Clinic Services
10. Transportation

PART IV—ORGANIZATION**A. STATE OFFICE OF MEDICAL PROGRAMS****B. MEDICAL ASSISTANCE ADVISORY COUNCIL**

1. Membership
2. Functions

C. COUNTY ASSISTANCE OFFICE

D. COUNTY MEDICAL AND DENTAL CONSULTANTS

(This Section provides a general description of the medical care programs for both the categorically and medically needy persons on whose behalf the Department makes payments to medical agencies or practitioners. The regulations as given in this Section provide only a general overview of the medical care programs. They do not here include all the details of the regulations that govern the medical care programs. The details are set forth in other Sections of this Manual.)

PART I—ADMINISTRATION OF MEDICAL CARE PROGRAMS

The Department of Public Welfare (Office of Medical Programs) has responsibility for establishing the scope, standards, regulations, procedures and fees for medical care provided for (1) categorically needy persons who are eligible for the full medical program, i.e. for persons financially eligible who do or do not receive money payments depending on whether or not they meet all other points of eligibility, and (2) for the medically needy persons who receive limited medical assistance because their incomes are insufficient to pay for major medical expenses although sufficient for their everyday necessities.

The County Assistance Office has responsibility for administering the medical care programs on the local level within Departmental regulations, and subject to review and supervision by the State Office of Medical Programs.

Additional information is given in Part IV on the responsibilities and functions of the State Office of Medical

Programs and the County Assistance Office in administration of the medical care programs, as well as others involved, such as the Medical Assistance Advisory Council and the County Medical and Dental Consultants.

PART II—MEDICAL CARE PROGRAMS FOR CATEGORICALLY NEEDY PERSONS AND FOR SCHOOL CHILDREN WHO ARE ONLY MEDICALLY NEEDY

GENERAL POLICIES

A. PURPOSE OF PROGRAM

1. *For Categorically Needy Persons*

The broad general purpose of the Department's Office of Medical Programs, as set forth in the Public Assistance Law, is to provide assistance to the needy and distressed, to enable them to maintain for themselves and their dependents a decent and healthful standard of living, and to do this in such a way as to promote self-respect, rehabilitation and, if possible, self-dependency.

Included in the needy and distressed are (1) those persons who have applied for and have been found eligible for a money payment from the Office of Public Assistance, and (2) those persons who have been found financially eligible but are not eligible for a money payment because they do not meet State regulations. However, under Title XIX of the Social Security Law these persons are eligible for the same vendor payments for the medical care that is provided persons actually receiving a money payment.

Also specified in the Law, among the responsibilities of the County Assistance Office are these: "To take measures to promote the welfare and self-dependency of indi-

viduals and families eligible for assistance by helping them to secure rehabilitative, remedial or other constructive aid through local community resources, or in the absence or inadequacy of such resources, through direct provision of such aid. . .” Such aid has heretofore been provided only to persons receiving money payments. Title XIX, the 1965 amendments to the Social Security laws, broadens this responsibility to provide the same service to people financially eligible but who do not meet one or more of Pennsylvania’s requirements for money payment assistance. (See 3910)

In dealing with the problem of dependency the Department has the dual purpose of relieving the distress and suffering of individuals and families unable to be completely self-dependent, and at the same time promoting self-dependence by helping each individual and family applying for public assistance to deal more effectively with the environmental and personal causes of their dependency.

The importance of medical care in carrying out this dual purpose is clear. Adequate medical care to relieve distress and suffering or to promote positive health, or both, with the goal of enabling the individual and family to use their maximum potential for self-dependence must now be available to all categorically needy persons.

2. *For School Children*

The purpose of the program is to meet the cost of treatment a child needs for a condition recorded in the child’s school health record, and for which the child’s parents or guardian are unable (according to law and regulations) to pay.

B. METHOD OF PAYMENT

In accordance with public assistance regulations and fee schedules, the Department makes direct payments to practitioners and vendors for services, medications, and medical supplies provided. This system is necessary because medical needs are extremely varied and unpredictable, requiring an individualized and flexible way of meeting these needs. The practitioner and vendor send bills to the appropriate fiscal agent or the Comptroller’s Office of the B.P.W.

Payment for such health items as the usual household medicine chest supplies and items of personal care is not included in the system of practitioner and vendor payments because these items constitute a common, predictable, continuing need. Therefore, an amount of money to meet this need is included in the money payment to the recipient, in the determination of eligibility of the need amount of the non-money payment recipient, and in the evaluation of resources of a medically needy school child.

C. ELIGIBILITY FOR CARE

A resident of Pennsylvania, either in the state or temporarily outside is eligible for medical care if he is a categorically needy person irrespective of whether he is or is not receiving money payments. A newborn infant for whom an application has not as yet been made is also eligible.

A school child is eligible for medical care: (1) if he is categorically needy, *or* (2) if he has been certified as medically needy, *and* (3) the referral to public assistance has been made by the School Nurse. (A “school child” includes a child attending, or scheduled to enter within the

current year, a Pennsylvania (public or private) elementary, grade or high school, or kindergarten that is an integral part of a local school district.) A summary of the services and eligibility conditions for Medical Assistance for school children is given in Leaflet No. 5 available from the County Board of Assistance, or from the Department of Public Welfare, Harrisburg.

Since medical care is paid only for eligible persons, it is the responsibility of the practitioner or vendor, in order to be assured of payment, to verify with the County Board of Assistance that the person is eligible.

D. PROFESSIONAL PARTICIPATION

The Public Assistance medical care program, operating on a voluntary participation basis, is open to any practitioner of medicine, osteopathy, chiropractic, or dentistry, any clinic, pharmacist, nursing home, hospital, clinic, or vendor of medical supplies in Pennsylvania or in another State who meets the requirements described under the regulations for each of the participating professions. The practitioner or vendor who participates in the program, giving services, thereby signifies his agreement to comply with the regulations and intent of the program.

Subject only to the practitioner's, vendor's, or institution's willingness to participate in the program and abide by the regulations, the patient has the right of free choice of practitioner, vendor, or institution.

E. SERVICES PAID FOR

1. *Summary*

The Department of Public Welfare pays for those types of medical and allied services given in the home, of-

fice, clinic, or hospital, that are generally recognized as necessary treatment of illnesses.

It is the Department's intention to pay for adequate medical care, in accordance with accepted standards of good medical practice, to achieve the purposes set forth earlier.

There is no intention to pay for extravagant or superfluous medical care, or care that would be beyond the means of the average family of moderate income. Nor will the Department pay for new and expensive medication or treatment that is still in the experimental stage.

The Department expects that the professional participants, in giving services and prescribing supplies within the scope of the program, will not exceed in any individual instance what is essential for adequate medical care for that individual.

The fees paid by the Department are in full payment of services given. A practitioner who seeks or accepts additional remuneration of any kind from the patient, or any other person, shall be considered as violating the regulations of the medical care program and will be subject to disciplinary action.

The program of medical care includes: physicians', clinic, and dental services, medications, medical goods and supplies, ambulance service, inpatient hospital care, hospital-home care, nursing care in the home, public nursing home care, private nursing home care, care in a mental institution, and medical-social services, in accordance with the regulations and fees established by the Department.

The program of medical care is supplemental to other existing resources for medical services or supplies, and pre-

General Medicaid Regulations

supposes full use of other tax-supported or voluntary agencies or facilities for meeting medical needs.

It is the responsibility of each County Assistance Office to be aware of all such resources in the area and to see that these are fully used in meeting the medical needs of assistance recipients and others who apply for medical assistance.

The Department should be charged only for services that are not available through any other existing tax-supported or voluntary facility. It is recognized that the services of many such facilities are limited in scope and availability. However, some are available throughout the State. The Department will not pay for or duplicate services that are available from these state-wide facilities and agencies. They include: treatment for rabies—available through County Authorities; vaccinations—available through local school districts or facilities of the State Department of Health or local boards of health; physicians' services to assistance recipients in hospitals; medical care for recipients certified for medical services under the Workmen's Compensation Act or the Occupational Disease Act; services for handicapped children—provided by the State Department of Health; treatment for tuberculosis or venereal diseases—the responsibility of State Health Clinics. Since the diagnosis of tuberculosis and venereal disease may not be known to the patient when he first seeks medical care, the Department will pay for the initial visit to a private physician or a hospital clinic when necessary to establish a diagnosis. (This is not paid for a school child who is only medically needy, since diagnostic service is provided in the course of the school health examination.)

General Medicaid Regulations

The program of medical care as defined in regulations is designed to provide treatment for all the usual medical needs arising from illness, disability, or infirmity, and for certain needs associated with restoration to self-support. Specific situations may arise in which adequate medical care requires unusual or exceptional types of treatment, medication, or supplies that are not specified in the public assistance regulations and are not available from any other source. In such cases, at the request of the practitioner, transmitted through the County Assistance Office, the State Office of Public Assistance will review the circumstances and approve and pre-authorize the service when it is deemed necessary to meet adequately the needs of the eligible patient.

2. Physicians' Services

In accordance with the specific regulations governing physicians' services, the Department pays for office and home calls for chronic or acute illness. Home calls are paid for only when it is situationally impossible or medically inadvisable for the patient to go to the physician's office.

In cases of acute illness the Department will pay for the minimum number of calls deemed necessary by the physician for adequate medical care in each individual instance.

In chronic illness, payment is limited to a maximum of three calls per month. It is not expected, however, that this maximum will be charged in instances where one or two calls would have sufficed.

Obstetrical care and minor surgery, performed in the home or office, are paid for.

X-ray study in the physician's office, if necessary for diagnosis, is also a covered service. The Department does not pay for diagnostic laboratory tests and x-rays provided in the course of the school health examination.

The services of a physician for a complete physical examination may be paid if needed to determine a recipient's condition or an applicant's eligibility for assistance; for the annual general medical examination of public assistance recipients in private nursing homes; and for other needed special medical examinations. Prior authorization is required.

On written prescription by the physician, payment is made for drugs. Payment for drugs on one prescription is limited to a 45 days' supply. If the charge for the medication is more than \$15 prior authorization through the County Assistance Office is required.

Medication dispensed by a physician during a home or office call may be paid for if the medication costs the physician \$2 or more; but prior authorization is required if the charge is more than \$15.

In addition to the physicians' services summarized above, the Department also pays the following for an eligible school child: eye examinations and refractions, eyeglasses, and podiatrist's services.

For a patient who is receiving skilled nursing or intermediate care, the Department does not pay for medical services given by a physician who owns that institution in whole or in part, has a financial interest in it, operates it, or is acting in any other capacity that indicates he is not an independent contractor.

The detailed regulations on physicians' services are in medical assistance regulations 9411.

3. Pharmaceutical Services

In accordance with the specific regulations governing pharmaceutical services, the Department pays for drugs, medical supplies and equipment for eligible persons.

If the charge for any item is more than \$15 for one prescription, the Department pays the pharmacist only if he has written authorization from the County Assistance Office before filling the prescription.

Payment for any prescription is limited to a 45 days' supply.

For a person in a nursing home for whom the Department is making a nursing home care payment, payment will not be made for any services, medications, and supplies included in the medical assistance definition of skilled nursing or intermediate care.

The detailed regulations on pharmaceutical and other vendor services are in medical assistance regulations 9413.

4. Clinic Services

Payment is made for: pre-natal care, and treatment for chronic and acute illness, with limits on the number of chargeable visits, as outlined above under physicians' services; and x-ray studies for diagnosis or definition, with the exception outlined above under physicians' services. For the eligible school child, payment may be made for eye examinations and refractions.

Clinic pharmacies are expected to fill prescriptions written by clinic physicians. Payment will not be made for

General Medicaid Regulations

drugs and supplies that are ordinarily dispensed without charge to non-assistance patients who are unable to pay.

The detail regulations on clinic services are in medical assistance regulations 9412.

5. Dental Services

In line with the Department's intent to provide adequate, but not extravagant or superfluous care, priorities for dental treatment have been established as a basis for restrictions on services. The priorities are listed in medical assistance regulations in 9414.

Payment is made for dental x-rays and medications prescribed by dentists, in addition to other dental care.

6. Ambulance Services

Payment may be made for necessary ambulance services if they are not available without charge to other needy persons in the community. The limitations are set forth in medical assistance regulations 9415.

7. Nursing Care in the Home

Payment is made for the nurse's initial visit on the request of the patient or any interested person. Subsequent visits will be paid for only if made on the written order of the attending physician.

The Department will pay for nursing service for chronic or acute illness, maternity service, or instruction of the patient, in accordance with the medical assistance regulations and the fee schedule.

General Medicaid Regulations

8. Inpatient Hospital Care

Payment is made for inpatient hospital care, based upon documented medical necessity. For specifics, see medical assistance regulations 9421.

9. Hospital-Home Care

Payment is made for hospital-type care in the home provided by the hospital as an uninterrupted continuation of inpatient hospital care. Payment is for up to 180 days in a benefit period. For specifics, see medical assistance regulations 9422.

10. Skilled Nursing Care

Payment is made for skilled nursing care for all eligible persons.

Payment may continue for as long as the need and eligibility continue. For specifics, see medical assistance regulations 9424.

11. Intermediate Care

Payment is made for intermediate care for all eligible persons.

Payment may continue for as long as need and eligibility continue. For specifics, see medical assistance regulations 9425.

12. Care in a Mental Institution

Payment is made for service in an institution for mental diseases for a person aged 65 or older and under age 21 who needs psychiatric service. Payment may continue for as long as the need and eligibility continue. For specifics, see medical assistance regulations 9426.

13. *Medical-Social Services*

A broad range of social services, including specific services related to illness, is provided as needed to persons applying for or receiving public assistance money payments. The objective is to enable them to attain or retain independence or self-care or both.

Specific social services related to illness are provided as needed in relation to a school child for whom an application is being made for Medical Assistance, or who is receiving Medical Assistance. This includes social services in medical emergencies.

F. COOPERATION BETWEEN PRACTITIONER AND PUBLIC ASSISTANCE STAFF

Cooperation between the practitioner and the public assistance staff is necessary for effective planning with the patient and his family. To restore the patient to health as early and completely as possible, he and his family will often need social services provided by the public assistance staff to help the patient and family in carrying out the plan of treatment advised by the practitioner.

The public assistance staff will give the practitioner any information it has on social factors that may have a positive or negative bearing on treatment. Such information may be on environmental factors, the individual's capacity to understand and participate in a medical treatment plan, his responsibilities, his material and personal resources, and his ability to use resources effectively.

It is recognized that, under a program that allows the patient the right to initiate medical services, a certain num-

ber of requests for unnecessary care may result. Practitioners, particularly physicians, are requested to report to the County Assistance Office the names of Medical Assistance recipients who continue to make unnecessary demands for medical attention. The County Assistance Office will cooperate with the practitioner in trying to solve such problems.

The County Assistance Office will bring to the attention of the practitioners involved the names of recipients who "shop" for medical care, and are treated by more than one practitioner during the same month. If the practitioners concerned are unable to control the situation, the County Assistance Office will ask the recipient to choose one practitioner and will notify the practitioners that only that one will be paid, except in an emergency when the practitioner selected by the recipient is not available to treat him.

PART III—MEDICAL CARE PROGRAM FOR PERSONS WHO ARE ONLY MEDICALLY NEEDY

The Department pays for the medical services listed below (in items 1 through 10) for eligible persons who are taking care of their everyday living expenses themselves, but have insufficient income, according to law and regulations, to pay for these major medical expenses:

1. *Inpatient Hospital Care* (same as for assistance recipient—see Part II E item 8).
2. *Hospital-Home Care* (same as for assistance recipient—see Part II E. item 9).
3. *Nursing Care in the Home* (same as for assistance recipient—see Part II E. item 7).

General Medicaid Regulations

4. *Skilled Nursing Care*
5. *Intermediate Care*
6. *Care in a Mental Institution*
7. *Medical-Social Services*
8. *Physician's Services*
9. *Clinic Services*
10. *Transportation*

Specific social services related to illness are provided as needed to persons applying for or receiving Medical Assistance. This includes social services in medical emergencies.

PART IV—ORGANIZATION**A. STATE OFFICE OF MEDICAL PROGRAMS OF THE DEPARTMENT OF PUBLIC WELFARE**

In the administration of the Medical Programs, the responsibilities of the State Office are:

- a. To establish standards, regulations, and fees governing medical care of a quality acceptable to competent authorities in their respective medical fields.
- b. To obtain maximum cooperation from practitioners in providing quality services for assistance recipients and other medically needy persons, as economically as possible with due regard for essential needs of the patients and a fair return to the practitioner.
- c. To make maximum use of all existing medical and allied resources available to medically needy persons.

General Medicaid Regulations

d. To promote coordination of the Medical Programs with other State-wide health programs.

e. To secure the advice of the health professions through the Medical Assistance Advisory Council, and encourage each County Assistance Office to establish a County Medical Care Committee.

The State Office of Medical Programs, undertaking to provide medical care for eligible persons through a system of direct payments to practitioners and vendors, is in effect a non-medical agency purchasing the services of individual members of medical and allied professions throughout the State.

In administering the Medical Care program, circumstances occasionally arise indicating that certain practitioners may not be observing the regulations of the Department on giving services or invoicing for services, or may possibly be providing inferior, inadequate, or incorrect medical care. Under such circumstances, an investigation will be initiated and, if the facts warrant, consideration will be given to disciplinary action against the practitioner.

B. MEDICAL ASSISTANCE ADVISORY COUNCIL**1. Membership**

The members of the Medical Assistance Advisory Council are appointed by the Secretary of Public Welfare for a two or three year term. The appropriate State professional organizations are requested to make recommendations for appointment to the Council.

The Council consists of two representatives, respectively, from the fields of medicine, osteopathy, dentistry,

General Medicaid Regulations

nursing, nursing home care, pharmacy, and hospital care; one representative each from the schools of public health, and medical schools; the Deputy Secretary of the Pennsylvania Department of Health; the Commissioner of General and Special Hospitals, and the Commissioner of Medical Programs. The Director of Medical Assistance is Chairman of the Council.

The members of the Council serve without pay but are reimbursed, in accordance with Departmental regulations, for necessary expenses incurred in their service as Council members.

2. Functions

The functions of the Council are:

- a. To give professional advice to the Office of Medical Programs on the development of sound policies and standards of medical assistance.
- b. To encourage the participation of well-qualified practitioners in the medical programs.
- c. To interpret the programs to the professional organizations and to individual members of the professions.
- d. To recommend measures designed to improve the quality of health care provided for the needy.
- e. To promote professional support of the programs in relation to needed legislation and appropriations.

General Medicaid Regulations

C. COUNTY ASSISTANCE OFFICE

The general responsibility of the County Assistance Office in relation to the Medical Care Programs is to administer them in accordance with the policies and regulations of the Department of Public Welfare.

In administering the Medical Programs, the County Assistance Office consults, as appropriate, with its related professional staff and advisory groups.

Almost every County Assistance Office has on the staff a County Medical Consultant and a County Dental Consultant (for their functions, see D below).

The County Assistance Office makes the fullest possible use of the consultants for liaison between the county administration and the professional organizations; for advice on matters of dispute or disciplinary action between the agency and members of the professions in administering medical aspects of the programs; for advice on medical policy, professional standards, and fees for service; and in the review of invoices submitted and services rendered, in any way necessary to assure the agency of value received in the services it purchases.

The County Assistance Office or consultants may also seek the advice of other individuals or representatives of allied professions, or of organizations of recognized standing in the fields of health and social welfare whose advice may assist in promoting the objectives of the Medical Programs.

The County Assistance Office maintains a current list of all professional persons and agencies in the county who

General Medicaid Regulations

participate in the Medical Care Programs. This list is maintained to facilitate transmission of official notices and to provide a list from which an eligible person may, if he wishes, select a practitioner.

D. COUNTY MEDICAL AND DENTAL CONSULTANTS

The County Assistance Office shall have on its staff a Medical and a Dental Consultant.

The primary function of the Consultant is to provide professional advice on individual cases as needed. He works directly with staff on services to individual clients, on specific medical or dental problems, etc. The Consultant also has functions in staff development and in liaison with medical, dental, and allied professions.

The Consultant acts in an advisory or consultative capacity to the county assistance administration; he does not administer the public assistance medical or dental programs. The county assistance administration retains authority for accepting or rejecting the Consultant's recommendations, for the agency is legally responsible for final administrative decisions.

The Consultants are under the general administrative direction of the County Assistance Office. The Medical Consultant is under the professional direction of the Medical Director of the Office of Medical Programs. The Dental Consultant is under the professional direction of the State Office Bureau of Medical Services which has a Dental Consultant.

Medical Assistance Memorandum No. 57

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE

Harrisburg, September 25, 1975

MEDICAL ASSISTANCE MEMORANDUM NO. 57

Supplement No. 2

SUBJECT: REIMBURSEMENT FOR NONTHERAPEUTIC ABORTIONS—TEMPORARY REVISED POLICY

**TO: PHYSICIANS
HOSPITALS
FAMILY PLANNING CLINICS
FREE-STANDING CLINICS
INDEPENDENT LABORATORIES
REGIONAL OFFICES
COUNTY ASSISTANCE OFFICES**

FROM: JAMES R. HARRIS, M.D.

ACTING DEPUTY SECRETARY FOR MENTAL HEALTH AND MEDICAL SERVICES

Previous Therapeutic Abortion Policy

Since the beginning of the Medical Assistance Program and until July 20, 1975, therapeutic abortions were covered under the following circumstances: (1) There is

Medical Assistance Memorandum No. 57

documented medical evidence that continuance of the pregnancy may threaten the health or life of the mother; (2) There is documented medical evidence that the infant may be born with incapacitating physical deformity or mental deficiency; or (3) There is documented medical evidence that a continuance of a pregnancy resulting from legally established statutory or forcible rape or incest, may constitute a threat, to the mental or physical health of a patient; (4) Two other physicians chosen because of their recognized professional competency have examined the patient and have concurred in writing; and (5) The procedure is performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals.

Social and economic reasons were never considered as justification for a therapeutic abortion.

Temporary Revised Policy

In accordance with recent Federal court rulings and until further notice, the Medical Assistance Program under a temporary revised policy will cover services and payments for nontherapeutic abortions, as well as therapeutic abortions, provided to eligible recipients by licensed physicians in licensed facilities or a physician's office. This temporary revised policy is effective for such services on and after July 21, 1975.

When and Where Abortions May Be Performed

During the first twelve (12) weeks of a pregnancy, a therapeutic or nontherapeutic abortion may be performed in a licensed physician's office, a clinic approved by the Department of Health or a licensed hospital facility.

- Medical Assistance Memorandum No. 57

After the first twelve (12) weeks of a pregnancy and until the end of the second trimester, a therapeutic or nontherapeutic abortion may be performed only in a licensed hospital.

Only a therapeutic abortion may be performed in the third trimester in a licensed hospital.

Abortions Performed in a Physician's Office

Under the temporary revised abortion policy, licensed physicians will be reimbursed for therapeutic or nontherapeutic abortions performed in their offices according to the procedure codes and fees in Specimen A.

Physicians will bill on a Standard Medical Invoice, Form PA 259. An Invoice Transmittal, Form PA 259-S, must accompany each group of invoices submitted to the Division of Finance, 123 Walnut Street, Harrisburg, Pennsylvania 17101.

Abortions Performed in a Hospital Clinic or Other Clinic Approved by the Department of Health

Under the temporary revised policy for therapeutic or nontherapeutic abortions performed during the first twelve (12) weeks of pregnancy in a hospital outpatient clinic or other clinic approved by the Department of Health, a maximum fee of \$50.00 is allowed for the use of the facility, medications, and all supplies used in the performance of the procedure. Separate laboratory and x-ray fees will be reimbursed to the actual provider in accordance with fees in Appendix I of Section 9411. A separate professional fee will be paid to an independent licensed physician or group practice performing the procedure in accordance with fees in Specimen A.

Medical Assistance Memorandum No. 57

The DPW fees are maximum rates allowed. If the facility, physician, or other providers' fees to the general public are lower, then the lower fees are to be charged to the Medical Assistance Program.

Invoicing Procedures

The Standard Medical Invoice, Form PA 259 will be used by hospital clinics and clinics approved by the Department of Health when submitting claims for abortions performed during the first twelve (12) weeks of a pregnancy. Free-standing clinics approved by the Department of Health are listed in Specimen B.

The maximum fee of \$50.00 and itemized laboratory and x-ray fees for services provided by the facility will be listed on the PA 259. Form PA 259-S, Invoice Transmittal, must accompany each group of invoices submitted to the Division of Finance, 123 Walnut Street, Harrisburg, Pennsylvania 17101 for payment.

Laboratory tests and x-rays performed by a hospital or independent laboratory or x-ray facility will be billed on a Standard Medical Invoice, Form PA 259, in the usual manner by such providers.

The separate professional fee will be billed on a Standard Medical Invoice, Form PA 259, and submitted along with an Invoice Transmittal, Form PA 259-S, to the Division of Finance, 123 Walnut Street, Harrisburg, Pennsylvania 17101. Hospital-based salaried physicians covering outpatient clinics are not eligible to bill a separate professional fee.

*Medical Assistance Memorandum No. 57**Abortions Performed on an Inpatient Basis*

Under the temporary revised policy all therapeutic or nontherapeutic abortions for Medical Assistance patients after the first twelve (12) weeks and until the end of a pregnancy, or a therapeutic abortion done in the third trimester, must be performed on an inpatient basis in a licensed hospital or a short procedure unit of a hospital. An interim payment will be made to the hospital subject to an annual cost adjustment.

The admission must be post-approved under PDUR or alternative system of concurrent review. Also, the hospital must obtain a PA 5-M from the County Assistance Office certifying the benefit days available for a recipient.

Invoicing Procedures

Hospital invoices for inpatient abortions are submitted through the fiscal agent under the same procedure used for other inpatient services. The invoices will show the MA per diem charges for room and board and other related charges for the inpatient care, except the physician's fee.

The attending physician will invoice Blue Shield on a Doctor's Service Report using the procedure codes and terminology listed in Specimen A. An Invoice Transmittal, Form PA 259-S must accompany each group of invoices submitted to Pennsylvania Blue Shield, Box 19, Camp Hill, Pennsylvania 17011. Hospital-based salaried physicians covering inpatient services are not eligible to bill a physician's fee since the salary costs are in the hospital's audited costs.

Inquiries on Temporary Revised Policy

Any questions regarding the temporary revised policy may be referred to the Bureau of Medical Assistance, Policy Division, Room 523, Health and Welfare Building, Harrisburg, Pennsylvania 17120, telephone 717/787-7362.

ABORTION POLICY

Established October, 1970, by the Pennsylvania Medical Society*

The House of Delegates, the ruling body of the 12,000 physician-member Pennsylvania Medical Society, considered at its October, 1970, annual meeting several proposals for changing the State Society policy concerning abortions and then took a position which basically is a reaffirmation of a policy established in 1967.

Therefore, it is the position of the Pennsylvania Medical Society that abortions should be legal only under the following circumstances:

"1. There is documented medical evidence that continuance of the pregnancy may threaten the health or life of the mother;

"2. There is documented medical evidence that the infant may be born with incapacitating physical deformity or mental deficiency, or

"3. There is documented medical evidence that continuance of a pregnancy, resulting from legally established statutory or forcible rape or incest, may constitute a threat to the mental or physical health of a patient;

"4. Two other physicians chosen because of their recognized professional competence have examined the patient and have concurred in writing; and

* This position was reaffirmed in 1974. *Health Care in Pennsylvania*: 1974, 77 *Pennsylvania Medicine*, 30, 36 (August, 1974).

Pennsylvania Medical Society Position

"5. The procedure is performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals."

Essentially, the position specifies that there be recognized medical reasons for performing an abortion rather than social reasons.

So-called "abortion on demand" legislation makes the procedure available to all who want it for either medical or social reasons or a combination of both. For instance, such legislation would enable a woman to have an abortion performed legally just because she wants an abortion. She could be in good physical and mental health, the fetus may be presumed to be normal, the process of childbirth and rearing another baby may pose no threat to her physical and mental health and she still would be entitled to an abortion in a state where "abortion on demand" legislation exists. Under those circumstances, there may be social justification for such an abortion but no specific medical justification. "Social justification" might include abortion as a form of population control or as a means of avoiding the social stigma attached to unwed females becoming mothers, just to mention two examples.

The Pennsylvania Medical Society favors family planning and through it, population control, but it does not recognize abortion as a medically accepted method of family planning or population control. Opponents of the medical society position point out that conception prevention, medication, devices and methods are readily available and are even provided upon request through Pennsylvania's "Medicaid" program for the medically indigent. The position favors conception prevention where such pre-

Pennsylvania Medical Society Position

vention is desired and notes that although a modern medical abortion is a relative safe procedure it nevertheless carries some small risk to the health of the patient.

If we take the example of an unwed pregnant female, the Pennsylvania Medical Society position well may permit an abortion to be performed if the three physicians specified agree that the female's emotional reaction to the social stigma that may be attached to becoming a mother is such that it poses a threat to her mental health. This position also would permit an abortion if the female had been forced to submit to the intercourse at which conception took place or had participated in the intercourse prior to the legal age of consent, i.e., legally established forcible or statutory rape. Many physicians may maintain that virtually all circumstances of a pregnancy resulting from statutory or forcible rape or incest pose with the pregnancy and the eventual birth of the child a very real threat to the mental (emotional) well-being of the female and the Pennsylvania Medical Society position would countenance an abortion under those circumstances when three such physicians so agree.

For a contrasting and rather bizarre counter situation, the Pennsylvania Medical Society position would not countenance performing an abortion on a woman for the sole reason that she may prefer to go on a trip to Europe rather than have another child.

Although the Pennsylvania Medical Society position on abortion may be regarded by some persons as being "very conservative", from the above examples it should be evident that it is quite liberal in its definition of medical justification even though it may not

Pennsylvania Medical Society Position

be as liberal as some persons may wish it to be for social reasons.

The Pennsylvania Medical Society is, essentially, a medical organization although the inference should not be drawn that it never makes policy decisions affecting social components. However, in the instance of the abortion position the reasons cited were completely medical and thus are, in the opinion of the Pennsylvania Medical Society, the only justifiable ones for interrupting a pregnancy.

Supreme Court, U. S.
FILED

SEP 20 1976

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-554

FRANK S. BEAL, etc., *et al.*,
Petitioners,

v.

ANN DOE, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENTS

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TABLE OF CONTENTS

	<i>Page</i>
TABLE OF CITATIONS	i
SUMMARY OF ARGUMENT	2
INTRODUCTION	2
ARGUMENT:	
I. TITLE XIX STATUTORY FRAMEWORK	4
A. Generally	4
B. State Discretion	8
C. Physicians' Discretion	13
II. PENNSYLVANIA REGULATIONS WHICH LIMIT ALTERNATIVE TREATMENTS FOR PREGNANCY FURTHER NO STATE INTEREST AND, THEREFORE, ARE VIO- LATIVE OF TITLE XIX	16
Medical Necessity	19
III. PENNSYLVANIA'S LIMITATIONS ON ABORTION SERVICES VIOLATE THE TITLE XIX REQUIREMENT THAT EACH STATE PROVIDE COMPREHENSIVE FAMILY PLANNING SERVICES	24
CONCLUSION	34

TABLE OF CITATIONS

Cases:

Allen v. Grand Central Aircraft Co., 347 U.S. 533 (1954)	31
Brewster v. Gage, 280 U.S. 327 (1929)	30
Burns v. Alcala, 420 U.S. 575 (1975)	14,17,32
Carleson v. Remillard, 406 U.S. 598 (1972)	14
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District of Columbia Podiatry Society v. The District of Columbia, 407 F. Supp. 1259 (D.D.C. 1975)	18
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Doe v. Wohlgemuth, 376 F. Supp. 173 (W.D. Pa. 1974), aff'd <i>sub nom. Doe v. Beal</i> , 523 F.2d 611 (C.A. 3rd Cir. 1975) cert. granted July 6, 1976	2,8,19
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United States v. Dickerson, 310 U.S. 554 (1940)	30
United States v. Vuitch, 402 U.S. 62 (1971)	4
White v. Beal, 413 F. Supp. 1141 (E.D. Pa. 1976)	11,33
<i>Statutes and Regulations:</i>	
<i>Social Security Act</i> , Title XIX, §1902, as added July 30, 1965, Pub. L. 89-97, 79 Stat. 344:	
42 U.S.C. §1396	3,4,7,8,20,25
42 U.S.C. §1396a(a)10	5,9
42 U.S.C. §1396a(13)(B)	6
42 U.S.C. §1396d(a)(1)-(5)	6
42 U.S.C. §1396a(a)(10)(C)	6
42 U.S.C. §1396a(a)(13)(C)	6
42 U.S.C. §1396a(a)23	8,14
42 U.S.C. §1396a(a)17	10,17,22,30
42 U.S.C. §1396d(a)(4)(B)	12,21

42 U.S.C. §1396a(a)(19)	14,16,22
42 U.S.C. §1396d(a)(5)	17
42 U.S.C. §1396a(a)30	20
42 U.S.C. §1396d(a)(4)(C)	24,30,32
42 U.S.C. §1396b(a)(15)	27
42 U.S.C. §1396b(e) (repealed 1972)	7
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15	
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45 C.F.R. §249.10(a)(1)	5
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45 C.F.R. §249.10(b)	12
45 C.F.R. §249.10(a)(3)(IV)	13
45 C.F.R. §249.10(a)(5)i	32,33
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1965 U.S. Code Cong. and Adm. News 1943	15
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	<i>Page</i>
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-554

FRANK S. BEAL, etc., *et al.*,
Petitioners,

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ANN DOE, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENTS

SUMMARY OF ARGUMENT

A. Under Title XIX of the Social Security Act Congress intended that decisions as to what treatment is appropriate for an individual's condition be left to the professional discretion of the physician. The Act requires limitation on or substitution for this discretion by the state be supported by some interest being furthered consistent with the purposes of the Act. Pennsylvania's abortion policy which limits and otherwise disrupts the exercise of physician discretion does not promote any such interest and therefore is unreasonable and violative of Title XIX.

B. By amending Title XIX of the Social Security Act to include Family Planning Services, Congress intended to provide indigent women with a choice as to family size. Congress did not permit states to exclude from Family Planning Services any method which would contravene the purposes of the amendments or exclude a particular class of recipients from benefits. Pennsylvania's limitation on abortion services is violative of Title XIX in that the policy defeats the Congressional objectives and excludes certain women from coverage.

INTRODUCTION

Petitioners, defendants in the district court, are now seeking reversal of the judgment of the United States Court of Appeals for the Third Circuit.¹ The court of appeals held that the regulations and procedures of the Department of Public Welfare of the Commonwealth of Pennsylvania, as such procedures apply to reimburse-

¹*Doe v. Beal*, 523 F.2d 611 (C.A. 3rd Cir. 1975). Further references in this brief to the lower court opinion are limited to the Appendix.

ment for abortions performed within the first two trimesters of pregnancy, are invalid because they violate Title XIX of the Social Security Act, 42 U.S.C. §1396, *et seq.*²

The regulations and procedures of the Commonwealth limited reimbursable abortion services to the following situations:

- "1. There is documented medical evidence that continuance of a pregnancy may threaten the health or life of the mother;³
2. There is documented medical evidence that an infant may be born with incapacitating physical deformity or mental deficiency; or
3. There is documented medical evidence that a continuance of a pregnancy resulting from a legally established statutory or forcible rape or incest, may constitute a threat to the mental or physical health of a patient;
4. Two other physicians chosen because of their recognized professional competency have examined the patient and have concurred in writing; and
5. The procedure is performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals."

Petitioners contend that this policy distinguishes between abortion services which are medically necessary to protect or maintain the recipients health and those abortion services which are performed for other reasons. Petitioners admit that factors regarding mental health are valid considerations. Brief for Petitioners, note 6, p. 5.

Petitioner's have not acknowledged that the preserva-

²Further references in this brief are limited to "Title XIX," "the Act", or the specific United States Code section.

³Note that Brief for Petitioners (p. 4) inadvertently omits "or life" in stating the policy. See, App. p. 32a.

tion of a woman's health involves factors recognized in *United States v. Vuitch*, 402 U.S. 62 (1971) and *Doe v. Bolton*, 410 U.S. 179 (1973)⁴ including the factor of whether or not the pregnant woman wishes to give birth given her familial status.

To the extent that Petitioners will acknowledge that the breadth of physicians' discretion on the abortion decision is the same under Title XIX as the Court enunciated in the above cases, Respondents concede that the state may legitimately interpose the attending physician between the woman's desire to abort and the services.

Absent this acknowledgement, Respondents submit that Title XIX requires the Commonwealth to pay for all abortion services for eligible women performed by a licensed physician when those services are not contrary to the patient's interests.

ARGUMENT

I.

TITLE XIX STATUTORY FRAMEWORK

A. Generally

Congress in 1965 amended the United States Social Security Act to include Title XIX, Grants to States for Medical Assistance Programs, commonly known as the Medicaid Program. 42 U.S.C. §1396 *et seq.* Title XIX authorizes the yearly appropriation of federal money to enable the states to furnish medical assistance to indigent persons. No state is required to participate in the program.

⁴See the Memorandum for the United States as Amicus Curiae on the Petition for a Writ of Certiorari, note 5, p. 5.

Those states, such as Pennsylvania, which elect to participate with the federal government under Title XIX must develop a state plan to be submitted to and approved by the Secretary of Health, Education and Welfare (H.E.W.). Participating states must conform to federal requirements such as providing for financial participation to share in the cost of the program.

Similarly working programs have been described by this Court as being based on a "scheme of cooperative federalism". *King v. Smith*, 392 U.S. 309, 316 (1968). The state under Title XIX, as opposed to the federal government, is specifically charged with the duty of administering medical assistance.

In revamping the scheme for the use of federal money in providing medical assistance to indigents in 1965, Congress imposed specific limitations on participating states as well as allowing the states certain areas of broad discretion. In understanding how Congress intended responsibilities to be designated certain portions of Title XIX warrant further notation.

For those persons so impoverished as to require financial aid in meeting every day maintenance expenses Congress required that medical assistance be made available. These persons, known as the "categorically needy", are defined as "all individuals receiving aid or assistance under any plan of the state approved under subchapter (Title) I, X, XIV, or XVI, or part A of subchapter IV of this chapter (Act), or with respect to whom supplemental security income benefits are being paid under subchapter XVI of this chapter". 42 U.S.C. §1396a(a)(10). 45 C.F.R. §249.10(a)(1).

The scope of medical assistance provided to these "categorically needy" persons must at least include seven basic services as defined in the Act as follows:

- (1) inpatient hospital services (other than services in an institution for tuberculosis or mental diseases);

- (2) outpatient hospital services;
- (3) other laboratory and X-ray services;
- (4)(A) skilled nursing facility services (other than services in an institution for tuberculosis or mental diseases) for individuals 21 years of age or older
- (B) effective July 1, 1969, such early and periodic screening and diagnosis of individuals who are eligible under the plan and are under the age of 21 to ascertain their physical or mental defects, and such health care, treatment, and other measures to correct or ameliorate defects and chronic conditions discovered thereby, as may be provided in regulations of the Secretary; and (C) family planning services and supplies furnished (directly or under arrangements with others) to individuals of child-bearing age (including minors who can be considered to be sexually active) who are eligible under the state plan and who desire such services and supplies;
- (5) physicians' services furnished by a physician (as defined in section 1395x(r)(1) of this title), whether furnished in the office, the patient's home, a hospital, or a skilled nursing facility, or elsewhere;

42 U.S.C. § 1396a(13)(B) and § 1396d(a)(1)-(5).

In addition to the categorically needy, the Social Security Act also allows for the inclusion of persons who are of sufficient means to meet daily maintenance requirements and, therefore, not eligible for cash welfare, but who are otherwise eligible for assistance under the state plan. 42 U.S.C. § 1396(a)(10)(C). These persons are known as the "medically needy".

A participating state which includes coverage for the "medically needy" must include within the scope of coverage for these persons at least the seven services listed above as required for the "categorically needy" or the care and services listed in any seven of the clauses numbered (1) through (16) of section 1396d(a). 42 U.S.C. § 1396a(a)(13)(C).

Congressional authorization for the appropriation of federal money under Title XIX is accompanied by a broad, two-pronged statement of purpose. On one hand the authorization is to enable the states to provide medical assistance on behalf of families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services. In addition, the authorization is for the purpose of enabling the states to provide services to help such indigent families and individuals to attain or retain capability for independence or self-care. 42 U.S.C. § 1396.

The broad statement of purposes has generally remained consistent since the passage of the Act in 1965. The original Act, however, included a more specific Congressional goal of broadening the scope of medical and remedial services until a comprehensive program was achieved by a date certain:

"(e) The Secretary shall not make payments under the preceding provisions of this section to any state unless the state makes a satisfactory showing that it is making efforts in the direction of broadening the scope of the care and services made available under the plan and in the direction of liberalizing the eligibility requirements for medical assistance, with a view toward furnishing by July 1, 1975, comprehensive care and services to substantially all individuals who meet the plan's eligibility standards with respect to income and resources, including services to enable such individuals to attain or retain independence or self-care." 42 U.S.C. § 1396b(e) (repealed 1972).

This specific language was repealed by the 1972 amendments to the Social Security Act. Recent legislative history reveals, however, that Congress has

not totally abandoned its original goal of comprehensive services.⁵

Also noteworthy is that Title XIX does not contemplate that states directly provide medical services to the beneficiaries of the program. Rather the Act envisions a system of state reimbursement to health care providers when services are rendered to eligible individuals. 42 U.S.C. §1396d(a). This system allows the beneficiary to select the provider of services to the extent the program can attract providers to participate. 42 U.S.C. §1396a(a)(23). No provider of services is required to participate in the program and, therefore, no beneficiary is guaranteed services.

B. State Discretion

The scheme of cooperative federalism as operative for the furnishing of medical assistance to indigents gives the states wide latitude in tailoring the medical assistance program to meet the needs and conditions existing in the particular state. 42 U.S.C. §1396.

No state is required to participate in the federal program. Each state can elect whether the "medically needy" will be included as beneficiaries. A state electing to include the "medically needy" is given a range of options as to the scope of services to be made available to them. Each of these examples of state discretion indicates the Congressional recognition that varying factors, such as economic factors, within each state require differing approaches to providing medical assistance.

In addition to these more clearly defined state

⁵ See comment, *Abortion on Demand in a Post-Wade Context: Must the state pay the bills?*, 41 Fordham Law Review 921, 932 (1973). See also *Doe v. Beal*, n. 14 (A. 142a).

options, Title XIX also indicates that the states will have wide discretion in determining the extent of services to be provided. Repeated references in the Act to amount, duration and scope of medical assistance imply the state's role in defining extent of services.⁶

Limitations

While Title XIX does not explicitly define the parameters of state discretion in determining the extent of assistance, it is clear, especially in light of the following, that unbridled state discretion in this area was not envisioned.

The Act imposes limitations on state discretion by the "comparability standard" which requires that the medical assistance made available to the medically needy not be less than that available to the categorically needy. And in addition, assistance available to individuals within each category must be equal to assistance available to other individuals within the same category. Section 1396a(a)(10) which reads in part as follows:

(10) provide—

(A) for making medical assistance available to all individuals receiving aid or assistance under any plan of the state approved under subchapter I, X, XIV, or XVI, or part A of subchapter IV of this chapter, or with respect to whom supplemental security income benefits are being paid under subchapter XVI or this chapter;

(B) that the medical assistance made available to any individual described in clause (A)—

(i) shall not be less in amount, duration, or

⁶ See the lower court's discussion of the areas of state discretion. (A. 135a-137a).

scope than the medical assistance made available to any other such individual, and

(ii) shall not be less in amount, duration, or scope than the medical assistance made available to individuals not described in clause A; and

(C) if medical assistance is included for any group of individuals who are not described in clause (A) and who do not meet the income and resources requirements of the appropriate state plan, or the supplemental security income program under subchapter XVI of this chapter, as the case may be, as determined in accordance with standards prescribed by the Secretary—

(i) for making medical assistance available to all individuals who would, except for income and resources, be eligible for aid or assistance under any such state plan or to have paid with respect to them supplemental security income benefits under subchapter XVI of this chapter, and who have insufficient (as determined in accordance with comparable standards) income and resources to meet the costs of necessary medical and remedial care and services, and

(ii) that the medical assistance made available to all individuals not described in clause (A) shall be equal in amount, duration, and scope.

To the extent which the Act permits the states to limit assistance it requires the states to adopt standards in defining the extent of medical assistance. The Act further requires that such standards be reasonable and consistent with the objectives of Title XIX. 42 U.S.C. § 1396a(a)(17).

Regulations issued by H.E.W. pursuant to the Act further indicate the limitations on state discretion in extending services. Each state plan must:

Specify the amount and/or duration of each item of medical and remedial care and services that will be provided to the categorically needy and to the medically needy, if the plan includes this latter

group. Such items must be sufficient in amount, duration and scope to reasonably achieve their purpose. 45 C.F.R. § 249.10(a)(5).

One court has held that this regulation prevents a state medical assistance plan from limiting the providing of eyeglasses to persons with eye pathology as opposed to ordinary refractive errors. *White v. Beal*, 413 F. Supp. 1141 (E.D. Pa. 1976), appeal pending.

The district court in *White* found that the purpose of eyeglasses is to aid or improve vision and that refractive errors constitute more of a visual impairment than eye pathology. Thus, the court held that such a limitation was impermissible since the limited service was not sufficient to reasonably achieve the purpose.

An additional part of the same regulation [45 C.F.R. § 249.10(a)(5)] further limits states' discretion by prohibiting them from arbitrarily denying or reducing the amount, duration or scope of services to an otherwise eligible individual solely because of the diagnosis, type of illness or condition. This standard was additionally relied upon in *White, supra* in holding the eyeglasses limitation invalid.

The prohibition against limiting assistance based on a diagnosis, type of illness or condition has been relied upon by H.E.W. in formulating a policy concerning state attempts to eliminate particular treatments. In Policy Information Memo No. 3 from the Medical Services Administration to regional staff, which memo is dated August 27, 1970, the following language appears:

"4. We believe that if the provision in Handbook Supplement D-5140, stating that 'limitations may not be set by eliminating certain groups of patients or certain diagnoses from coverage,' is retained, the state is equally precluded from eliminating any particular treatment from its program. For example, if a patient receives hemodialysis as part of

his inpatient hospital care, this particular treatment method presumably would have to be paid for. That this treatment is expensive is not a reason for precluding it under Medicaid. On the other hand, as far as expensive practitioners' services are concerned, such as psychoanalysis, the states have some control by virtue of their authority to establish maximum fee schedules."

The Handbook provision to which reference is made is now contained in its essence in H.E.W. regulations, 45 C.F.R. § 249.10(a)(5).

Further limitation on state discretion can be found in the federal definitions of medical services. The statutory listing of services [42 U.S.C. § 1396d(a)(1)-(17)] provides no explicit indications that a state is limited in defining the extent of any particular service. Federal regulations, however, define the listed services. 45 C.F.R. § 249.10(b). This regulation can be read as mandating the inclusion of care and services in state plans to the extent such services are defined in the regulations.⁷ Given the breadth of some of the definitions, however, it is unlikely that they were intended to be mandatory.⁸

Despite the inability to interpret Congress's listing of services as a general mandate on the states in defining the extent of services, certain services listed in the Act are so narrow as to their goal that such goal cannot be reasonably achieved without mandatory inclusion of certain specific methods. For example, early and periodic screening and diagnosis of children [42 U.S.C. § 1396d(a)(4)(B)], given acceptable professional

⁷The introductory phrase in the regulation reads in part as follows: . . . "Federal financial participation is available in expenditures for medical or remedial care and services under the state plan which meet the following definitions:"

⁸See the lower court's discussion of this point. (A. 144a-147a).

standards for an adequate screen, could not be said to be more than mere tokenism if a visual examination were not included in the screen. Notwithstanding the lack of a specific statutory reference to eye examinations, Congressional intent to include such service is manifest reading the Act as a whole. H.E.W. regulations making this service mandatory on the states support this conclusion. 45 C.F.R. § 249.10(a)(3)(IV).

These examples are illustrative of the notion that unbridled state discretion as to the extent of medical assistance is not contemplated by Title XIX. Respondents submit in their final argument that Pennsylvania is specifically prohibited from reimbursing only select abortion services based on the 1972 amendments to the Act concerning family planning services. In addition, Respondents first argue that approaching Title XIX with regards to the division of responsibility between the state and physician as contemplated by Congress renders Pennsylvania's limitations impermissible under the Act.

C. Physicians' Discretion

While the 1965 Congressional attempts at establishing a comprehensive national health program were bound to have a significant impact on the delivery of health services in our country, nothing in the statutory framework indicates that Congress intended to disrupt the traditional roles which each party, necessary to the delivery of such services, had previously fulfilled.

The federal government would provide substantial amounts of money to the states and set parameters within which the states must function; each participating state would share in the cost of the program, administer the program within the state and tailor the program to meet the particular needs and conditions

within the state;⁹ doctors and other providers of services would continue to exercise their professional judgments in the best interests of patients; and recipients or patients would retain a free choice of providers of services as is fundamental in the private sector.

Specific provisions of Title XIX taken collectively reflect Congressional intent that physicians participating in the program are to retain their traditional function of determining what treatment and services are most appropriate for individual patients. The Act requires each participating state to provide such safeguards as may be necessary to assure that care and services will be provided in a manner consistent with simplicity of administration and the best interests of recipients. 42 U.S.C. §1396a(a)(19). The simplicity requirement is contrary to the administrative burden of individualized state determinations on what treatment is appropriate for individual patients. Further, the best interests of recipients cannot be served unless the difficult task of selecting treatment appropriate for a condition requiring medical attention is primarily retained within the province of the physician.

The statutory requirement that recipients be given a free choice of providers of services [42 U.S.C. §1396a(a)(23)] becomes a hollow grant to the extent state imposed standards in the election of treatment are tolerated within the program.

In concluding that Congress intended the physician to retain primary authority in deciding what treatment

⁹Compare the states' role in the Medical Assistance Program with its role under Title IV of the Social Security Act, Aid to Families with Dependent Children, 42 U.S.C. §601 *et seq.*, *King v. Smith*, 392 U.S. 309 (1968); *Townsend v. Swank*, 404 U.S. 282 (1971); *Carleson v. Remillard*, 406 U.S. 598 (1972); *Burns v. Alcala*, 420 U.S. 575 (1975).

is appropriate for a recipient under both Titles XVIII and XIX, the Court of Appeals (A. 141a) properly relied on the Report of the Senate Committee on Finance, reporting favorably on the amendments:

(1) Physicians' Role

The committee's bill provides that the physician is to be the key figure in determining utilization of health services—and provides that it is a physician who is to decide upon admission to a hospital, order tests, drugs and treatments and determine the length of stay. 1965 U.S. Code Cong. & Adm. News 1943, 1986.

It is noteworthy that as part of Title XVIII of the Act, Health Insurance for the Aged and Disabled (Medicare), Congress specifically included a prohibition against Federal interference:

Nothing in this subchapter shall be construed to authorize any Federal officer or employee to exercise any supervision or control over the practice of medicine or the manner in which medical services are provided. . . . 42 U.S.C. §1395.

In regards to this prohibition, see also in the legislative history 1965 U.S. Code Cong. & Adm. News p. 1965:

The responsibility for, and the control of, the care of the beneficiaries rests with the hospitals, extended care facilities, the beneficiaries' physicians, etc.

Congressional intent to preserve the role of the physician within the Title XIX scheme has been recognized by federal courts in addition to the Third Circuit. The district court in *Roe v. Ferguson*, 389 F. Supp. 387, 392 (S.D. Ohio 1974) rev'd and rem. 515 F.2d 279 (C.A. 6th Cir. 1975) spoke of the "protection which the Social Security Act normally affords the physician-patient relationship." Also, the district court in *Roe v. Norton*, 380 F. Supp. 726, 729 (D. Conn.

1974) rev'd and rem. 522 F.2d 928 (C.A. 2nd Cir. 1975) perceived the basic philosophy of Title XIX as emphasizing wide discretion in the physician as to treatment decisions.

Finally, it is especially important that Petitioners are in accord with the special emphasis placed by Congress on the role of physician in the Title XIX scheme:

Petitioners agree that an overriding concern of Congress in Title XIX was that states not interfere with the exercise of a physician's discretion. But certainly that discretion is not boundless. Brief for Petitioners, p. 18.

II.

PENNSYLVANIA REGULATIONS WHICH LIMIT ALTERNATIVE TREATMENTS FOR PREGNANCY FURTHER NO STATE INTEREST AND, THEREFORE, ARE VIOLATIVE OF TITLE XIX.

As demonstrated above, Title XIX does not support the notion of either absolute state discretion or absolute physicians' discretion. Rather, when conflict arises between the functions of the doctor and state, the Act contemplates a rational analysis which will result in the best interests of recipients being served. 42 U.S.C. §1396a(a)(19). Pennsylvania's limitations on abortion services except in narrowly defined circumstances eliminate a particular alternative treatment for pregnancy without any rational basis and, therefore, as argued below, are not consistent with the Act.

Given the complexity and ever-changing nature of the matter addressed by Congress in Title XIX, it cannot be expected that specific language on every possible service would appear in the Act. Despite the lack of a specific reference to abortion services in the Act and despite the

sensitive nature of the issue,¹⁰ whether a state may eliminate this treatment from the medical assistance plan should be answered by reference to the general statutory standards for permissible state intervention into the realm of physicians' discretion.

Any state limitation in the extent of medical services is subject to the federal standard contained in 42 U.S.C. §1396a(a)(17) which requires a rational basis for the limitation and that it be consistent with the purposes of the Act. Given the Congressional emphasis on physicians' discretion, state limitations on alternative treatments appear subject to a more strict standard of rationality than general limitations on broad medical conditions. Assuming that the treatment selected by the physician is within the legitimate practice of medicine as defined by state law [42 U.S.C. §1396d(a)(5)], the state should be required to demonstrate textually how a statutorily permissible purpose is being furthered by the interference with the physician's choice.¹¹

This approach to Title XIX as applied to abortion services renders Pennsylvania's limitations on those services impermissible.

This Court has already recognized in the criminal context that a physician treating a pregnant woman may exercise his professional judgment free of state

¹⁰See *Roe v. Wade*, 410 U.S. 113, 116 (1973).

¹¹Analytically, this position is similar to the judicial treatment of eligibility under Title IV of the Act, Aid to Families with Dependent Children. If a category of individuals is included in the federal standard a state may not eliminate the category unless federal authorization for the option is manifest. *Burns v. Alcala*, 420 U.S. 575 (1975), *King v. Smith*, 392 U.S. 309 (1968). Here, the federal standard for inclusion, while not as specific as in Title IV, is founded on the Congressional emphasis on physicians' discretion. Limitations on that discretion must satisfy the federal requirement [42 U.S.C. §1396a(a)(17)] of a rational connection to a statutorily permissible interest.

intervention up to the point where compelling state justification exists. And further that, "up to those points, the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician." *Roe v. Wade*, 410 U.S. 113 (1973).

Thus, the lower court's conclusion (A. 149a) that pregnancy is a condition for which treatment is necessary and that the appropriate treatment is to be determined by the attending physician is consistent with this Court's views as well as other federal courts. See *Roe v. Norton*, *supra*; *Klein v. Nassau County Medical Center*, 347 F. Supp. 496, 500 (E.D.N.Y. 1972) vac. and rem. 412 U.S.C. 925 (1973).

Since Pennsylvania's policy limits the availability of an alternative treatment for a condition otherwise covered by the program, it works a disruption on the physician's choice and, thus, is subject to closer scrutiny than broad exclusions.

Concern for limited financial resources and concern for the health and safety of recipients are possible statutorily permissible interests which might be furthered through certain limitations on the extent of medical services provided by a state. When these interests are offered as justification for limiting physicians' discretion, however, several points must be noted. Other mechanism, such as the setting of fee schedules,¹² are available to the state to accommodate financial concerns. Also, to the extent the state is acting out of concern for the recipient, it must be remembered that Congress intended the physician to be the primary guardian of the recipient's health and safety.

Any state limitation on reimbursement for abortion

¹²See, *District of Columbia Podiatry Society v. The District of Columbia*, 407 F. Supp. 1259 (D.D.C. 1975).

services cannot be justified as furthering an economic interest. Abortion generally will be the least expensive of the alternative treatments attendant to pregnancy. *Doe v. Beal* (A. 149a); *Doe v. Rose*, 499 F.2d 1112, 1117 (C.A. 10th Cir. 1974); and *Klein v. Nassau County Medical Center*, 347 F. Supp. 496, 501 (E.D.N.Y. 1972) vac. and rem. 412 U.S. 925 (1973). Thus, only the most unrestrictive abortion policy can further the state's interest in achieving the most economical distribution of limited Medicaid resources.

Likewise, restricted abortion services cannot be justified under the Act as furthering the state's concern for the health and safety of beneficiaries. Abortions performed earlier in pregnancy constitute a significantly reduced risk to the patient's health than later treatments. *Beal v. Doe*, (A. 149a, 150a); Affidavit of Douglass Thompson, (A. 36a); and *Roe v. Wade*, 410 U.S. 113, 150 163 (1973).

Respondents respectfully submit, as was concluded by the lower court (A. 149a), that no justification consistent with the Act can be found for limiting the physician in selecting abortion as appropriate treatment for pregnancy.

Absent some textually demonstrable interest being furthered, the state standards for defining which abortions will be reimbursed cannot be said to be "reasonable" as required by Title XIX. As the Court of Appeals concluded (A. 149a), absent some state interest being furthered a limitation constitutes "[g]ratuitous interference with medical decisions by doctors" and this cannot be consistent with the purposes of Title XIX.

Medical Necessity

Title XIX contemplates that the exercise of state discretion in defining the extent of medical assistance

will include consideration of medical necessity. 42 U.S.C. §§1396, 1396a(a)(30); 45 C.F.R. §249.10(a)(5)(a).¹³ As discussed below, however, state concern for the necessity of a particular medical service is appropriate when a particular condition is diagnosed and is not properly asserted by the state at the time the choice of treatment must be made. This important distinction allows both the state and the physician a sufficient range of discretion to assure that the best interests of the recipients will be served as Congress intended.

A state program which limits medical assistance services to those which are medically necessary would appear to be striving to distribute limited financial resources in response to the most urgent needs of beneficiaries and, thus, in the best interests of recipients. To the extent that the state's concern for limited financial resources is inherent in decisions based on medical necessity some demonstrable interest is being furthered. However, Respondents submit that medical necessity in a vacuum, that is where no statutorily permissible interest is being furthered, cannot justify consistently with Title XIX state interference with the doctor's exercise of sound professional judgment. To assure that state reliance on considerations of medical necessity further some interest, these considerations will generally be limited to the broad decisions on whether certain conditions on diagnosis will be covered by the program. Once the condition is deemed by the state as requiring medical attention, the individualized determination of the appropriate treatment is a professional judgment involving necessity that the physician is called upon to

¹³Congress did not define medically necessary as it appears in 42 U.S.C. §1396, nor was its use in section 1396(a)(30) which was adopted in 1967 accompanied by a definition.

make routinely. See *Doe v. Bolton*, 410 U.S. 179, 1972 (1973).

Given limited financial resources for medical assistance a state may, for example, wish to exclude routine physical examinations from coverage under its medical assistance program. The issue of whether such examinations are "medically necessary" may draw varying opinions within the medical community. Despite the probability that certain recipients will suffer by not having disorders or impairments discovered sufficiently early, a state could choose not to provide such service based on considerations of necessity.¹⁴ This statutorily permissible exercise of state discretion based on medical necessity does not, however, involve limitations on physicians' discretion in selecting treatment for a condition otherwise requiring medical attention. Also a state's decision not to provide routine physical examinations is not based on medical necessity in a vacuum, but rather furthers the state's legitimate concern of addressing recipients' most urgent needs with limited resources.

Exercise of state discretion permissibly based on medical necessity at the time a condition is diagnosed must be contrasted with attempts to exclude a particular medical treatment from coverage based solely on the fact that other treatments applied later will either restore or preserve the patient's health. A state could not, for example, consistently with Title XIX exclude the use of cobalt as a treatment for cancer and thereby limit the alternative treatments to surgery. Nor as the lower court (A. 143a) suggested by way of example, could a state exclude early treatment for a tooth cavity thereby limiting treatment to extraction after the tooth has abscessed. Unless the state is

¹⁴This choice is not available to the states regarding children. 42 U.S.C. §1396d(a)(4)(B).

furthering some interest, such as requiring treatment to be consistent with established medical procedures in the interest of the recipient, the existence of alternative procedures cannot render one treatment unnecessary consistent with Congressional intent under Title XIX.

This analysis of medical necessity under Title XIX assures that the broad purposes of the Act will not be frustrated. The state is provided sufficient breadth of discretion to protect their own interests without undue interference with the physicians' discretion. The best interests of the recipients, both individually and collectively, will be advanced to the greatest extent possible. 42 U.S.C. § 1396a(a)(19). And states will be held to the requirement that exclusions be rationally based furthering some demonstrable interest. 42 U.S.C. § 1396a(a)(17).

In applying this analysis to the abortion decision it become apparent that state reliance on notions of medical necessity do not properly support limitations on abortion services.

In addition to the Court of Appeals, other courts have recognized that as to pregnancy, whether a particular treatment is necessary or unnecessary cannot constitute state justification for limiting physician discretion. The district court in *Roe v. Norton, supra* at 729 stated as follows:

There is nothing in the text or legislative history of the statute to suggest that when a patient's condition requires medical attention each alternative form of medical service that might be rendered must be deemed to be necessary to qualify for federal reimbursement. Such a notion would be contrary to the basic philosophy of both the Medicare and Medicaid provisions, which emphasizes the wide discretion to be accorded physicians in treating their patients... [W]hen a patient's condition does require some medical attention, the choice of service to be rendered

should normally be a matter between doctor and patient, and the service they select is eligible for payment, so long as it is an accepted medical procedure, and does not involve costs that are excessive compared to adequate alternatives. *Roe v. Norton, supra*, 380 F. Supp. at 729.

The court in *Coe v. Hooker*, 406 F. Supp. 1972 (D.N.H. 1976) (appeal pending) recognized that while the *Norton* decision was reversed by the Second Circuit, this particular point was affirmed:

Pregnancy is plainly a physical condition which requires medical attention. The nature of the services to be rendered is a matter between patient and doctor. If the woman carries the pregnancy to term, such services will normally include prenatal care, obstetrical services and post partum care. If, on the other hand, the woman elects to terminate her pregnancy by having an abortion permitted by law (in the first trimester, or otherwise), the medical services required are those in performing the abortion and an appropriate care thereafter. The care and services rendered in either of these circumstances would be equally "necessary" if such a showing were required by Title XIX. *Roe v. Norton, supra* at 934.

See also *Klein v. Nassau County Medical Center*, 347 F. Supp. 496, 500 (E.D.N.Y. 1972) vac. and rem. 412 U.S. 925 (1973).

In the context of criminal law, this Court in *Doe v. Bolton*, 410 U.S. 179, 191 (1973) has indicated, concerning the abortion decision, that even after a physician has exercised his best clinical judgment in light of all the attendant circumstances, it is still constitutionally permissible to require that the abortion be "necessary". This position the Court made clear was to assure that the judgment operated for the benefit, not the disadvantage, of the pregnant woman. The only abortion services remaining to fit the category of

"unnecessary" would be those contrary to the patient's interests.

Given the *Doe v. Bolton* analysis, the state has a legitimate interest in assuring that the physician's judgment on abortion, as in any context, will operate to serve the individual's best interests. Thus, abortion services performed without the informed consent of the patient or where pregnancy is not in fact established need not be reimbursed by the state. A state need not under XIX reimburse for abortion services which otherwise in the state have been declared illegal.

III.

PENNSYLVANIA'S LIMITATIONS ON ABORTION SERVICES VIOLATE THE TITLE XIX REQUIREMENT THAT EACH STATE PROVIDE COMPREHENSIVE FAMILY PLANNING SERVICES.

In 1972, Congress amended Title XIX¹⁵ adding as a required medical assistance service,

Family Planning Services and supplies furnished (directly or under arrangements with others) to individuals of child-bearing age (including minors who can be considered to be sexually active) who are eligible under the state plan and who desire such services and supplies. 42 U.S.C. §1396d(a)(4)(C).

Congress initiated mandatory programs of Family Planning Services for the purpose of providing low-income individuals and families with, "The freedom of choice to determine the spacing of their children and

¹⁵See Act of Oct. 20, 1972, Pub. L. 92-603, §299E(b), 86 Stat. 1459-1462.

the size of their families".¹⁶ By enabling indigent persons to limit the size of their families and/or space their children, Congress sought to assist, "those families . . . who desire to control family size in order to enhance their capacity and ability to seek employment and better meet family needs." Sen. Rep. 92-1230, *supra*. 297.¹⁷

Family Planning Services illustrate that certain mandatory "medical assistance" services are to be provided by the states for reasons other than to primarily promote physical health. It is the goal of limiting and/or spacing of children which a state's family planning program must foster to the maximum extent possible given the conditions in such state.

Prior to 1972, Congress sought to provide indigent persons with the opportunity to space their children and/or limit family size by requiring each state participating in the AFDC program to offer and provide family planning services to any AFDC recipient who requested such services.¹⁸

¹⁶See 113 Cong. Rec. 23085 (8/17/67); Sen. Rep. No. 92-1230, 92nd Cong., 2nd Sess. 297 (1971).

¹⁷See also 42 U.S.C. §1396 and 42 U.S.C. §602(a)(15), which set forth as one of the broad goals of Federal assistance programs generally, the improvement of indigent persons' ability to attain and/or retain capacity for independence or self-care.

¹⁸See Act of Jan. 2, 1968, Pub. L. 90-248, §201(a)(1)(C), 81 Stat. 877 (42 U.S.C. §602(a)(15), which provided: (A) for the development of a program for each appropriate relative and dependent child receiving aid under the plan, and each appropriate individual (living in the same home as a relative and child receiving such aid) whose needs are taken into account in making the determination under clause (7), with the objective of—

"(i) assuring, to the maximum extent possible, that such

Despite Congressional intention that the 1967 family planning amendments would assure the availability of comprehensive family planning services, the states failed to provide such services in the manner intended. In practice, the majority of states provided few "services" or "supplies," providing instead, mostly counseling and referral.¹⁹

(footnote continued from preceding page)

relative, child, and individual will enter the labor force and accept employment so that they will become self-sufficient, and

"(ii) preventing or reducing the incidence of births out of wedlock and otherwise strengthening family life,

"(B) for the implementation of such programs by—

"(i) assuring that such relative, child, or individual who is referred to the Secretary of Labor pursuant to clause (19) is furnished child-care services and that in all appropriate cases family planning services are offered them, and

"(ii) in appropriate cases, providing aid to families with dependent children in the form of payments of the types described in section 406(b)(2), and

"(C) that the acceptance by such child, relative, or individual of family planning services provided under the plan shall be voluntary on the part of such child, relative, or individual and shall not be a prerequisite to eligibility for or the receipt of any other service or aid under the plan,

"(D) for such review of each such program as may be necessary (as frequently as may be necessary, but at least once a year) to insure that it is being effectively implemented,

"(E) for furnishing the Secretary with such reports as he may specify showing the results of such programs, and

"(F) to the extent that such programs under this clause or clause (14) are developed and implemented by services furnished by the staff of the state agency or the local agency administering the state plan in each of the political subdivisions of the state, for the establishment of a single organizational unit in such state or local agency, as the case may be, responsible for the furnishing of such services."

¹⁹See Rosloff, *Family Planning Provisions of the Social Security Amendments of 1972* (HR-1), Oct. 20, 1972; and

(continued)

The 1972 amendment to Title XIX was a Senate response to concern that the then existing family planning programs were not successfully providing recipients with the ability to plan their parenthood and that as a consequence, economic improvement as well as family life were not being significantly enhanced. Recognizing that the aims of family planning were not being met, in large part because the states were not providing recipients with coverage for the medical services aspects of family planning, Congress sought to emphasize that such services are "primarily medical services".²⁰ By increasing the percentage of Federal cost participation to 90%²¹ and requiring states to provide, for the first time, family planning services as a medical assistance service, Congress sought to finally assure indigent persons that comprehensive family planning services would be available to enable them to choose when and if to have children.

Thus, contrary to the Petitioner's assertion at page 18 of his brief that physicians are not to be viewed as experts in recommending "services—even medical services," which assist in primarily fostering a social or economic goal, the 1972 Title XIX amendments to §1396d illustrate that Congress considered the physician to be the primary provider of family planning services, a medical service which Congress did not provide primarily to promote physical health but to instead improve indigents' ability to seek and hold employment and better meet family needs.²²

(footnote continued from preceding page)

Charles, *Enforcing Legal Rights to Family Planning and Abortion*, 8 Clearinghouse Review 422 (Feb. 1971) and authorities cited therein.

²⁰See Sen. Rep. 92-1230, *supra.*, 295-298.

²¹42 U.S.C. §1396b(a)(15).

²²This failure of the appellant to recognize that Title XIX

(continued)

By amending Title XIX Congress intended to provide recipients with *comprehensive* family planning services and, without doubt, any program of "comprehensive family planning" is generally viewed by medical experts and public health officials as encompassing such specific medical techniques as contraception, abortion, sterilization and treatment for infertility.²³ Abortion is generally recognized as a necessary element in a comprehensive system of family planning because it serves as a "back-up method" of handling contraceptive failure and as a means of meeting family planning needs where contraceptives have not been used or provided.²⁴

(footnote continued from preceding page)

"Medical Assistance" services were made available for purposes other than improving physical health has also led him into another false assumption that the sole touchstone of medicaid programs is "medical necessity". As is discussed *infra*, the scope of required family planning services are not to be defined by the extent to which the inclusion of a given method is "medically necessary". Instead, the scope of such services is to be defined in part, by the extent to which the exclusion of a given method would be inconsistent with the statute's general requirements and would lessen the successful attainment of the Congressional purpose; in the case of family planning services, the chance to limit family size and thus foster the economic and social goals of family planning. This assumption is further weakened by the fact that the state does provide coverage for *sterilization* as a family planning service even when it is only to further a goal unrelated to physical health. See, affidavit of Henry J. Smith (A. 42a).

²³Wallace, Goldstein, Gold and Oglesby, *A Study of Title XIX Coverage of Abortion*, Am. J. Pub. Health, 1116-1120 (Aug. 1972).

²⁴*Report of the President's Commission on Population Growth and the American Future*, G.P.O., 1972, 103; See also *Report of Secretary of H.E.W. submitting 5 Year Plan for Family Planning*, prepared for Special Subcomm. on Human Resources of the Sen. Comm. on Labor and Pub. Welfare, 92 Cong. 1st Sess. (Comm. Print 1971) at 319 (Hereinafter, Report of Secretary), where H.E.W. indicated that abortions were an element of compre-

(continued)

Many health experts consider the most rational and successful system of family planning to be one which prevents fertility by use of a contraceptive which is medically safe for use by the particular patient and which is backed up by the early aborting of pregnancies resulting from contraceptive failure.²⁵

At present, every known method of family planning has serious shortcomings.²⁶ Because family planning requires a selection from a number of imperfect alternatives, a workable comprehensive program requires judgments to be made in each individual case by a doctor and patient, on the basis of each patient's physical and emotional condition as well as their consciences. Like any Title XIX "medical assistance" service, a particular method of family planning services is not available upon a patient's "demand". The choice of method is not the patients' unilateral decision but is a joint decision made by the patients and their physicians. *Doe v. Bolton, supra*. An abortion is but one method of family planning the availability of which

(footnote continued from preceding page)

hensive family planning services; and C. Luker, *Taking Chances: Abortion and the Decision Not to Contracept* (1975) 20.

²⁵C. Tietze, "Induced Abortion—A Factbook", Reports on Population/Family Planning 48 (1972).

²⁶Oral contraceptives while highly effective and reliable often produce adverse side affects with or without prolonged use, and are therefore not medically acceptable method for many women. See *Contraceptive Technology*, Emory University School of Medicine, 1972, and sources cited therein; the intrauterine coil (I.U.D.) is not entirely effective and many women's bodies reject it. C. Tietze, *Manual of Family Planning and Contraceptive Practice* (Mary Calderone, Ed.) 2nd Ed., 1970, 269-71; Similarly, the diaphragm and the condom are ineffective in many instances. C. Tietze, *ibid*; Contraceptive foam also has a significant failure rate, G.S. Bernstein, "Clinical effectiveness of an Aerosol Foam", 3 *Contraception* 37, 43; the rhythm method has obvious shortcomings.

enlarges the freedom of physicians and patients to select a safe foolproof scheme to space and/or limit childbirth. The knowledge that an abortion is available as a back-up service thus permits a physician to prescribe, for those women whose history's caution against a particular form of contraception, a less effective but more medically appropriate form of contraceptive.²⁷

The Congressional decision to use the general phrase "family planning" to secure the mandatory provision of comprehensive family planning program in 42 U.S.C. §1396d(a)(4)(C) given the commonly defined scope of that phrase strongly indicates an intention to require coverage of abortions as part of the mandatory comprehensive family planning services each state must provide.

The failure of Congress to expressly exclude abortions as a covered method of family planning under Title XIX when it had done so previously²⁸ is additional evidence of an intention to include abortions as a covered item of family planning under Title XIX. "A change in phraseology creates a presumption of a change in intent, and that Congress would not have used different language . . . without intending a change in meaning." *Crawford v. Burke*, 195 U.S. 176, 190 (1904); *Brewster v. Gage*, 280 U.S. 327, 337 (1929); *United States v. Dickerson*, 310 U.S. 554, 451 (1940).

Of additional significance is the fact that Congress was aware in 1972 that H.E.W. considered abortions to be a part of then existing comprehensive family

²⁷To the extent the inclusion of abortion services permits physicians and their patients wider discretion in adopting safe, successful family planning programs such inclusion certainly serves the best interests of recipients. 42 U.S.C. §1396a(a)(17).

²⁸See 42 U.S.C. §300a-6, where Congress excluded coverage of abortions as a method of family planning.

planning service programs. *Allen v. Grand Central Aircraft Co.*, 347 U.S. 533, 544 n.12 (1954). In, "Report of the Secretary", H.E.W. indicated, under the heading, *Family Planning Delivery System as it Now Exists*, that:

"Within the context of Family Planning Service Programs, abortions are . . . viewed . . . as a service that should be available in accordance with local laws only in the event of a human or contraceptive failure." *supra*, at 319.

Also, in Hearings on H.R. 4208 before the House Sub-Committee on Public Health and Environment, 91st Cong., 2nd Sess. 1971, Part I, former Secretary of H.E.W., Elliott Richardson in response to an inquiry from Congressman James Hastings discussed the agency's view of abortions and family planning:

Mr. Hastings: "Along those lines, and a controversial question, and particularly in light of the action of several states recently, and talking about unwanted children, do you anticipate a policy emanating from your department as it relates to legalized abortion?"

Secretary Richardson: I don't anticipate that we would take a position on this as a Federal agency beyond saying in effect, that one, this is a matter for state action, and two, that in general we believe that medical services in cases where a pregnancy is unwanted or medically undesirable should be available without undue legislative restrictions.

Mr. Hastings: Would Medicaid payments cover abortion costs in a case where abortion is legal?

Mr. Richardson: "Yes, it would, where it is otherwise as you say a legal service." Hearings on H.R. 4208 before the Subcom. on Pub. Health and Envir., Int. and For. Commerce Comm., House of Representatives, 91st Cong., 2nd Sess., Part I, at 99. (Emphasis added).

As is discussed above there is nothing in the choice

of the phrase "family planning" to indicate that Congress intended to exclude abortion services as an acceptable back-up method in a comprehensive family planning program under Title XIX. More importantly, there is no indication in 42 U.S.C. §1396d(a)(4)(C) that Congress intended to single out family planning services as exempt from Title XIX's general requirements.

Like any Title XIX medical assistance service, the extent to which a state may exclude particular methods of providing the service must, in large part, be determined with reference to the requirements of Title XIX as a whole and the statutory purpose for providing the service. *Burns v. Alcala, supra*.

Congress intended for all mandatory Title XIX services to be "sufficient in amount, duration and scope to reasonably achieve their purpose." 45 C.F.R. §249.10(a)(5)(i). Using this standard, if the purpose behind providing a particular service is broad, the ability of the state to exclude recognized services which promote the purpose is similarly broad. Thus, the broadness of a goal such as that which was inherent in the Congressional decision to require states to provide physician's services can be reasonably met despite the exclusion of certain services physicians generally provide, physical check-ups, cosmetic surgery, dental or eye care.

However, when the goal behind a particular service is more specifically delineated the result often is that the state's ability to exclude generally recognized ways of providing such services are necessarily restricted. For example, while a state need not provide eye care services so as to promote the access of indigents to physicians services, if the state elects to provide eyeglass services they must provide enough eyeglass services to assure that the purpose behind that specific service, "improving vision", will be met. Thus, one Court has

concluded that a state's refusal to provide eye care to persons with refractive error violates Title XIX because by doing so the state fails to provide enough services to reasonably assure the improvement of vision. *White v. Beal, supra*. The goal of family planning is similarly narrow. Moreover, the various generally recognized methods which enable persons to limit and/or space their children are few in number. Given the fact that many women cannot use contraception medications or devices, that all known methods of contraception have a certain failure rate, and that some women will invariably change their mind regarding childbirth after becoming pregnant, the state cannot claim that it is providing enough family planning techniques to reasonably assure that all indigent persons will be able to limit and/or space their children. No one would argue that abortion services should be the primary method of assuring that persons are given the ability to control their families growth. But, given the current state of contraceptive technology and level of knowledge among low-income persons concerning contraceptive practices, the exclusion of abortion as a family planning method frustrates to a large degree the ability of persons to control their family growth, without serving any other purpose.

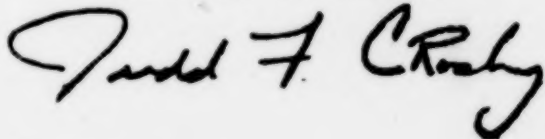
In addition to requiring that states provide enough of a given service to assure that the goal or goals behind such a service is met, Congress also intended that no state could arbitrarily deny or reduce the amount, scope and duration of a service to an individual solely because of such person's physical condition. 45 C.F.R. §249.10(a)(5)(i). Yet, if family planning services does not include abortion services every woman who is pregnant at the time she seeks family planning services or whose prior services were insufficient to prevent conception is eliminated from coverage.

Absent some indication that Congress did not intend to require states to provide enough services to reasonably assure that all indigent persons would be able to limit and/or space their children and intended to totally deny coverage to an entire class of recipients a state may not, consistent with Title XIX, refuse to provide abortion services to those Title XIX eligibles who after consultation with their physician seek an abortion.

CONCLUSION

On the basis of the above authorities and arguments, Respondents respectfully request this Court to affirm the decision of the United States Court of Appeals for the Third Circuit entered on July 21, 1975 by the court *en banc*, three of nine judges dissenting.

Respectfully submitted,

A handwritten signature in black ink, reading "Judd F. Crosby". The signature is fluid and cursive, with the first name "Judd" and last name "Crosby" clearly legible.

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AUG 16 1975

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-554

FRANK S. BEAL, *et al.*,
Petitioners,

vs.

ANN DOE, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States
Court of Appeals for the Third Circuit

**AMICUS CURIAE BRIEF OF THE STATE OF
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TABLE OF CONTENTS

	PAGE
INTEREST OF THE AMICUS	1
ARGUMENT—The broad congressional Medicaid assistance program which permits participating states extensive flexibility in fashioning Medicaid programs responsive to the particular needs of each state does not mandate assistance for nonmedically necessary abortions	4
CONCLUSION	8

Case Cited

Doe v. Klein, Docket No. 76-74	3
--------------------------------------	---

Federal Statutes Cited

42 U.S.C.:

Sec. 1396	4
Sec. 1396a(a)(17)	5
Sec. 1396a(a)(30)	5
Sec. 1396d(a)	5
Sec. 1396d(a)(1)	5
Sec. 1396d(a)(2)	5
Sec. 1396d(a)(3)	5
Sec. 1396d(a)(4)	5
Sec. 1396d(a)(5)	5
Sec. 1396a(13)(B)	5

	PAGE
Federal Regulations Cited	
45 C.F.R.:	
Sec. 249.10(a)(5)(i)	6
Sec. 250.20(a)	5
New Jersey Statute Cited	
L. 1975, ch. 261 (N.J.S.A. 30:4D-6.1)	3

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**AMICUS CURIAE BRIEF OF THE STATE OF
 NEW JERSEY**

Interest of the Amicus

The State of New Jersey is filing a separate *amicus curiae* brief in this matter because of its extreme importance to the State, in terms of the ability of its Legislature to fashion, within reasonable fiscal limits, such public

welfare assistance programs for medical services as it deems most responsive to the competing public needs. The decision of the United States Court of Appeals for the Third Circuit, as well as other similar decisions, which have interpreted Title XIX of the Social Security Act to impose upon the states the obligation to afford medical assistance for nonmedically necessary abortions are totally inapposite to the evident purpose and language of Title XIX and promise to affect the necessary flexibility a state must have to fashion public welfare assistance programs attuned to the immediate local climate.

The nature of the welfare assistance program in New Jersey in general and for medical services in particular, is extensive and varied. Because, however, the fiscal resources of the State are limited, it does not provide for every service which might be desired. Rather it reflects difficult choices made by the duly elected representatives of the people in terms of evaluating and balancing the complex and competing needs of the poor. The choices made by the State's Legislature concerning reimbursement for medical services are not only difficult because they must, of necessity, be selective, but they become even more difficult because of the delicate and controversial nature of the public welfare assistance program in general and the Medicaid program in particular. While the State must provide for the competing needs of its poor, it must do so with the confidence and acceptance of all of its people since the very well being of any democratic government depends totally upon the acceptance by and support of the people for whom it serves. This support and acceptance becomes particularly crucial when the State endeavors to provide for such controversial services as reimbursement for abortions. It is precisely this dilemma faced by any state's elected officials in attempting

to fashion responsive and remedial welfare assistance programs, that underlies the Congressional objective in Title XIX which grants to each participating state broad flexibility in fashioning medical assistance programs for the poor.

In an attempt to provide a sound and publicly accepted welfare assistance program of the State for medical services, the State of New Jersey, for the large part, has attempted to satisfy the most urgent and necessary needs of the poor. Thus, in terms of medical assistance, the State has, for the present, chosen to provide for those services which are medically necessary. In an attempt to extend such assistance for abortions, which so often has generated emotional reactions amongst the public, the State has followed this present policy and authorized, by Laws of 1975, Chapter 261 (N.J.S.A. 30:4D-6.1), assistance for the termination of a woman's pregnancy where "it is medically indicated to be necessary to preserve the woman's life." Even this limited approval of public assistance, however, has met substantial and widespread social and political resistance.

Indeed, a suit is presently pending in the Federal District Court for the District of New Jersey challenging the validity of the law on the same statutory and constitutional grounds raised below in this case. *Doe v. Klein*, Docket No. 76-74, United States District Court, District of New Jersey. As a result of the Court of Appeals' decision in this case, New Jersey's law has been preliminarily enjoined by the Federal District Court in *Doe v. Klein*. Any decision by the Court in the present case will substantially, if not conclusively, impact on the outcome of *Doe v. Klein* and the validity of Laws of 1975, Chapter 261.

Thus, an affirmance of the Court of Appeals' judgment would result in the imposition upon New Jersey of a highly controversial welfare assistance program for medical services which the State Legislature has determined, after considering the competing local concerns and needs, is not at the present time an appropriate allocation of available revenue resources. It is clear, therefore, that the State of New Jersey has a vital interest in preserving the authority and flexibility which has in the past been accorded its Legislature by the United States Congress to fashion provisions for controversial public welfare assistance which are consistent with its views of proper allocation of State resources amongst the competing interests of the poor.

ARGUMENT

The broad congressional Medicaid assistance program which permits participating states extensive flexibility in fashioning Medicaid programs responsive to the particular needs of each state does not mandate assistance for nonmedically necessary abortions.

The Medicaid Program established by Title XIX of the Social Security Act, 42 U.S.C. §1396 *et seq.*, provides a comprehensive scheme of federal financial assistance to enable states electing to participate to fashion appropriate programs for the furnishing of medical assistance to indigent families. The program is administered by the states and jointly funded by federal grants-in-aid and participating states. Annual appropriations by Congress are made to enable participating states "as far as practicable under the conditions in such states, to furnish . . . medical assistance" to qualified eligibles "whose income and resources are insufficient to meet the costs of necessary medical services." 42 U.S.C. §1396.

"Medical assistance" is defined in 42 U.S.C. §1396d(a) as payment for all or part of a broad range of types of medical care and services. A state, however, need not include in its Medicaid program all the categories of assistance described in that provision. In order to qualify for federal funding, a state medical assistance program is required to cover only those medical services enumerated in subsections (1) through (5): inpatient and outpatient hospital services, laboratory and X-ray series, skilled nursing facility services, family planning services and physician services. 42 U.S.C. §1396a(13)(B); 42 U.S.C. §1396d(a)(1)-(5).

Nor must participating states include every kind of medical treatment encompassed within the five required enumerated types of services set forth in 42 U.S.C. §1396d(a)(1)-(5). The operative state plan requirement with respect to the adequacy of the amount, duration and scope of the state's program coverage is whether the state has "reasonable standards . . . for determining eligibility for the extent of medical assistance under the plan which . . . are consistent with the objectives of [Title XIX]. . . ." 42 U.S.C. §1396a(a)(17). Within the bounds of this statutory criterion of "reasonableness," the states have considerable discretion in fashioning the contents of their medical assistance programs to meet local competing needs and social policies.

Pursuant to this broad Congressional scheme, coverage under a state's Medicaid Program may properly be limited to the costs of "necessary medical services." Indeed such plan must provide for a method of "utilization review" for each item of care or services listed in 42 U.S.C. §1396d(a) so as "to safeguard against unnecessary utilization of such care and services. . . ." 42 U.S.C. §1396a(a)(30); 45 C.F.R. §250.20(a). Moreover the federal reg-

ulations specifically authorize "[a]ppropriate limits . . . placed on services based on such criteria as medical necessity or those contained in utilization or medical review procedures." 45 C.F.R. §249.10(a)(5)(i).

Thus, a state's Medicaid Program may be reasonably designed to provide only such medical assistance as is medically necessary. And it surely is not "unreasonable" or inconsistent with Congressional intent to exclude from Medicaid coverage unnecessary medical services, such as cosmetic surgery, which even many non-needy persons cannot afford or may be unwilling to pay for. Similarly, it would be reasonable and consistent with Congressional intent for a state to exclude coverage for the cost of medical services that exceed appropriate limitations established in the interest of fiscal control, such as limitations on the number of days of inpatient hospitalization or on the number and kinds of prescription drugs that will be compensable under Medicaid. Indeed, the federal regulations provide that appropriate limits placed on medical services based on medical necessity, utilization controls, or medical review procedures do not render the medical services insufficient in amount, duration and scope to reasonably achieve their purpose, and (with respect to required services) do not constitute an arbitrary denial or reduction in the amount, duration or scope of such services. 45 C.F.R. 249.10(a)(5)(i).

Within this broad scheme, it surely cannot be contended that Title XIX requires reimbursement for the costs of all medically feasible abortions. As previously discussed, a state need not provide financial assistance with respect to all medical services merely upon the patient's request; and, indeed, may limit its coverage to those services which are medically necessary. There is no apparent indication that Congress intended abortions to be treated differently.

While, as the Solicitor General has indicated, the practical and emotional consequences of a failure to perform an abortion may be profound, the same may be said, for instance, of a failure to perform medically feasible cosmetic surgery; yet surely it is not inconsistent with Title XIX for a state to determine not to reimburse for abortions unless they are medically necessary, such as where the woman's life is threatened. Indeed, the Solicitor General of the United States has expressed precisely this view of Title XIX.

This broad flexibility given to the states under Title XIX is reflective of a recognition that the fashioning of social welfare programs is fundamentally a matter of each state's democratic process. Because of the delicate and often controversial nature of welfare programs, which, of necessity, must entail difficult, both politically and socially, choices concerning where and to whom the available public resources will be allocated, each state's elective representatives must be able to fashion the particular program they deem most responsive to the competing needs of the poor. Thus, while it is not the function of courts to choose between competing claims for public revenues or conflicting social and political theories, analogously, Title XIX is clear example of Congressional awareness that determinations concerning allocation of public funds involving, as they must, areas of local controversy, are best entrusted to each state's elected body of representatives.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the application of the appropriate Congressional intent and purpose in enacting Title XIX clearly demonstrates that the decision below is erroneous and therefore should be reversed.

Respectfully submitted,

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wealth of Pennsylvania, et al.,

Petitioners,

— vs —

ANN DOE, and a class,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT

BRIEF FOR *AMICI CURIAE*
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TABLE OF CONTENTS

	<i>Page</i>
Interest of Amici Curiae	1
Summary of Argument	3
Argument	4
Introduction	4
A. Pregnancy Is Clearly A Condition For Which Some Form Of Physician Care Is "Medically Necessary." Patient Choice Of The Form Of Treatment For That Condi- tion, Absent Some Legitimate State Interest In Protecting The Mother's Health, May Not Be Restricted By A State Medicaid Program	6
B. Congressional Intent In Enacting Medicaid Was Broad Enough To Encompass Any Medical Treatment, Then Legal Or Not, Which Might Be "Medically Necessary"	12
C. A Doctor's Decision To Perform An Elective Abortion Cannot Be Classified By The State As "Non-Medical" And Therefore Not "Medically Necessary"	16
D. This Court Is The Final Authority In Interpreting The Medicaid Statutes	19

	<i>Page</i>
E. The State's Real Objections To Funding Elective Abortions Are Based On Philosoph- ical, Not Legal, Grounds. Such Grounds Do Not Constitute A Permissible Reason For Refusing Medicaid Payments To Eligible Recipients	20
F. The State Has No Legitimate Interest In Refusing To Finance Elective Abortions	21
Conclusion	24

CITATIONS

Cases:

<i>Bellotti v. Baird</i> , 44 U.S.L.W. 5221 (1976)	5, 6, 8
<i>Coe v. Hooker</i> , 406 F. Supp. 1072 (D.N.H. 1976)	9, 20, 22, 23
<i>Connecticut v. Menillo</i> , 423 U.S. 9 (1975)	5, 7
<i>Doe v. Beal</i> , 523 F.2d 611 (3rd Cir. 1975)	9, 22, 23
<i>Doe v. Bolton</i> , 410 U.S. 179 (1973)	3, 4, 8, 12, 18
<i>Doe v. Rose</i> , 499 F.2d 1112 (10th Cir. 1974)	9
<i>Doe v. Westby</i> , 402 F. Supp. 140 (D.S. Dak. 1975), on remand from 420 U.S. 968, 383 F. Supp. 1143, appeal docketed, No. 75-813, Dec. 8, 1975	20, 22

	<i>Page</i>
<i>Doe v. Wohlegemuth</i> , 376 F. Supp. 173 (W.D. Pa. 1974), <i>aff'd. sub nom. Doe v. Beal</i> , 523 F.2d 611 (3rd Cir. 1975)	20
<i>King v. Smith</i> , 392 U.S. 309 (1968)	19, 24
<i>Klein v. Nassau County Med. Ctr.</i> , 347 F. Supp. 496 (E.D.N.Y. 1973), vacated and remanded for reconsideration in light of <i>Roe</i> and <i>Doe</i> , 412 U.S. 924 (1973)	9, 11, 20, 21
<i>Planned Parenthood Assn. v. Danforth</i> , 44 U.S.L.W. 5197 (1976)	5, 6, 8, 15, 17
<i>Planned Parenthood Assn. v. Fitzpatrick</i> , 401 F. Supp. 554 (E.D. Pa. 1975)	8, 21
<i>Poelker v. Doe</i> , 497 F.2d 1062 (8th Cir. 1974), No. 75-442, <i>prob. juris. noted</i> , 44 U.S.L.W. 3757 (1976)	5
<i>Red Lion Broadcasting Co. v. FCC</i> , 395 U.S. 367 (1969)	19
<i>Roe v. Ferguson</i> , 515 F.2d 279 (6th Cir. 1975)	13
<i>Roe v. Norton</i> , 380 F. Supp. 762, <i>rev'd</i> , 522 F.2d 928 (2d Cir. 1975), on remand, 408 F. Supp. 660, <i>appeal sub nom. Maher v. Roe</i> , No. 75- 1440, <i>prob. juris. noted</i> , 44 U.S.L.W. 3757 (1976)	9, 10

<i>Roe v. Wade</i> , 410 U.S. 113 (1973)	4, 6, 17, 23
<i>Townsend v. Swank</i> , 404 U.S. 282 (1971)	19
<i>Vialpando v. Shea</i> , 475 F.2d 731 (10th Cir. 1973), aff'd., 416 U.S. 251 (1974)	19
United States Statutes and Regulations:	
42 U.S.C. section 300a(b) (1970)	14
42 U.S.C. section 602(a) (15) 1970)	13
42 U.S.C. section 1320c-1 (1970)	10
42 U.S.C. section 1396 <i>et seq.</i> (1970)	5, 7
42 U.S.C. section 1396a(a) (10) (B) (1970)	5, 8, 22
42 U.S.C. section 1396a(a) (10) (C) (1970)	8, 22
42 U.S.C. section 1396a(a) (10) (1970)	8, 16
42 U.S.C. section 1396a(a) (14) (1970)	8, 16
42 U.S.C. section 1396a(a) (17) (1970)	8, 16
42 U.S.C. section 1396a(a) (19) (1970)	23
42 U.S.C. section 1396a(a) (30) (1970)	8
42 U.S.C. section 1396b(g) (1970)	8

42 U.S.C. sections 1396d(a), (f) and (c) (1970)	8, 18
42 U.S.C. section 1396d(a) (4) (C) (1970)	13
45 C.F.R. section 249.10(a) (1) (1975)	5
Miscellaneous:	
Bunker, <i>Elective Hysterectomy: Pro and Con</i> , 295 N. ENG. J. MEDICINE, 267 (1976)	10
CONG. REC. S. 16832 (Daily Ed., Sept. 17, 1974)	13
E. Dunbar, <i>Sterilization, FOOLPROOF BIRTH CONTROL</i> , 22 (L. Lader, ed. 1972)	15
H. Edey, <i>Sterilization, FOOLPROOF BIRTH CONTROL</i> , 42 (L. Lader, ed. 1972)	15
H.R. 3153, 93rd Cong., 1st Sess. section 198B.	13
REPORT OF THE PRESIDENT'S COMMISSION ON POPULATION GROWTH AND THE AMERICAN FUTURE, 103 (GPO 1972)	15
S. Rep. No. 92-1230, 92d Cong., 2d Sess. 297 (1972)	14

C. Tietze, <i>Induced Abortion: A Factbook</i> , REPORTS ON POPULATION/FAMILY PLANNING (1973)	15
Wallace, Goldstine, Gold & Inglesby, <i>A Study of Title XIX Coverage of Abortion</i> , AM. J. PUBL. HEALTH, 1116-1120 (Aug. 1972)	14

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 75-554

FRANK S. BEAL, Individually and as Secretary
of the Department of Public Welfare, Common-
wealth of Pennsylvania, et al.,

Petitioners,

VS

ANN DOE, and a class,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT

INTEREST OF AMICI CURIAE

Amici curiae respectfully submit this additional
argument to supplement that filed by Respondents here-

in, Ann Doe and the class which she represents. Amici have obtained permission from counsel for both Petitioners and Respondents to submit this brief, and the consents obtained from the parties are on file herein with the Clerk of the Court.

While amici are confident that counsel for Respondents will fairly and fully represent the interests of the class he represents, amici believe that his arguments will primarily represent the interests of that class, and that a full airing of the issues presented by this case will be aided by the submission of arguments reflecting the viewpoint of other groups of directly affected individuals. Accordingly, amici hereby submit this supplemental argument, which represents the interests of a substantial segment of the medical profession, as well as the interests of concerned citizens' groups.

The medical organizations and individuals listed on the cover of this brief have a direct stake in the outcome of this controversy, since the decision to perform any abortion is one participated in equally by both physician and patient. The non-medical organizations appearing as amici are well-established citizens' groups whose members will be directly affected by the resolution of this case. Their views are reflected herein and advanced in the hope that these viewpoints will complement those of the Respondents and lead to the affirmation of the decision of the court below.

SUMMARY OF ARGUMENT

A. Pennsylvania attempts to justify its refusal to reimburse elective abortion costs on the ground that its Medicaid program covers only those medical services which are "medically necessary." Pregnancy, however, is a condition universally recognized as requiring some form of medical care, and there is no reason to consider elective abortions less "medically necessary" than alternative treatments which the State *will* pay for, *i.e.*, "therapeutic" abortions and live birth. Under the Medicaid statutes, the choice of treatment for a condition requiring medical care is a decision for doctor and patient only, and the State may not interfere with that decision.

B. Congressional intent in enacting Medicaid was broad enough to allow reimbursement of elective abortions. Its failure specifically to mention this procedure is no indication of congressional intent to exclude it, since the statutes mention no specific Medicaid procedures. Rather, when Congress has intended to exclude abortion from federal funding, it has done so explicitly. Its failure to exclude abortions from coverage of the 1972 family planning amendments therefore further indicates that this treatment is reimbursable under title XIX.

C. The decision to perform an elective abortion cannot arbitrarily be classified as "non-medical" by the State. Rather, this Court's decision in *Doe v. Bolton*, 410 U.S. 179 (1973), clearly indicated that this choice of treatment was a proper "medical" decision.

D. An erroneous interpretation of title XIX by the Department of Health, Education and Welfare cannot be accorded any special weight by a reviewing court. Rather, where an agency erroneously interprets a controlling statute, the courts are the final authority on statutory interpretation.

E. The State's objections to funding elective abortions are based on moral, not legal, grounds. Such grounds do not provide a permissible basis for legislative classification. Accordingly, state refusal to fund elective abortion on these grounds must be declared violative of title XIX.

F. Under the guarantee of equal treatment in title XIX, the State may not arbitrarily force pregnant women to submit to the least voluntary choice of treatment for the condition of pregnancy, since it does not impose similar restrictions on persons suffering from other conditions which require medical treatment.

ARGUMENT

Introduction

This Court's January 1973 decisions in *Roe v. Wade*¹ and *Doe v. Bolton*² determined that the right to obtain an abortion is a fundamental right which cannot be unreasonably regulated by the states. These decisions left open, however, the extent to which states may impose non-criminal restrictions upon the right to

¹ 410 U.S. 113 (1973).

² 410 U.S. 179 (1973).

abortion.³ One such question, squarely presented by this case, is whether the federal government and the states must pay for abortions for women who are eligible participants in the Medicaid program and who cannot otherwise afford them.

The Medicaid program, a joint federal-state enterprise to provide essential medical services for the medically indigent, was established in 1965 by title XIX of the Social Security Act.⁴ Title XIX requires participating states to provide enumerated medical services to individuals characterized as "categorically needy,"⁵ and provides additional coverage for states which elect also to provide services to the "medically needy," individuals whose income is too great to qualify as categorically needy, but too low to cover the costs of medical care.⁶

Pennsylvania has elected to extend medical benefits to this "medically needy" group. 62 P.S. §441.1 *et seq.* It therefore extends coverage to both groups of patients for health services falling within several categories, such as "physicians' services," which are "medically necessary." Brief of the Petitioner, Supplemental

³ Such issues include whether a state can require parental or spousal consent before allowing abortions, a question already resolved in the negative by this Court in *Planned Parenthood v. Danforth*, 44 U.S.L.W. 5197 (1976), and *Bellotti v. Baird*, 44 U.S.L.W. 5221 (1976). Another such issue is whether public hospitals must perform abortions, a question presently before this Court in *Poelker v. Doe*, No. 75-442. On the other hand, reasonable regulation of medical standards has been held appropriate. *Connecticut v. Menillo*, 423 U.S. 9 (1975).

⁴ 42 U.S.C. §1396 *et seq.* (1970).

⁵ 45 C.F.R. §249.10(a) (1) (1975).

⁶ 42 U.S.C. §1396a (a) (10) (B) (1970).

Appendix at 61, 68 (quoting relevant state regulations). Therefore, should this Court determine that elective abortions constitute "medically necessary" treatment, both groups of Medicaid recipients will be eligible for reimbursement of those costs in Pennsylvania.

Plaintiffs (Respondents here) have challenged Pennsylvania's Medicaid statutes and regulations on the grounds that (1) title XIX requires funding of all abortions obtained by eligible Medicaid recipients, not just those abortions classified by Pennsylvania regulations as "medically necessary;" and (2) the State's policy of reimbursing only such "medically necessary" abortions violates the Equal Protection Clause of the Fourteenth Amendment and the right to privacy as recognized in *Roe v. Wade*,⁷ and further defined in *Planned Parenthood v. Danforth*⁸ and *Bellotti v. Baird*.⁹ Amici agree that the Pennsylvania Medicaid provisions are invalid on either of these grounds.

A. Pregnancy Is Clearly A Condition For Which Some Form Of Physician Care Is "Medically Necessary." Patient Choice Of The Form Of Treatment For That Condition, Absent Some Legitimate State Interest In Protecting The Mother's Health, May Not Be Restricted By A State Medicaid Program.

⁷ 410 U.S. 113 (1973).

⁸ 44 U.S.L.W. 5197 (1976).

⁹ 44 U.S.L.W. 5221 (1976).

The State attempts to justify its refusal to reimburse health care providers for "non-therapeutic" abortions on the ground that the federal Medicaid law authorizes payment of federal funds only for services which are "medically necessary,"¹⁰ explaining that it "has limited the coverage of its Medicaid program to those services which are medically necessary at the time of their utilization." Brief of the Petitioner at 11. This argument clearly rests on the assumption that birth is somehow more "medically necessary" than abortion, since the State *will* reimburse costs of prenatal, obstetrical, and post-partum care in cases where it is unwilling to pay the costs of an abortion.

There is no physiological or psychological basis for labeling the medical services attendant to birth more important or necessary than those attendant to abortion. When a woman is pregnant she requires medical care. The sole choice involved is birth or abortion and either must be provided by a physician.¹¹ The distinction here contended for by Pennsylvania rests upon its social policy preference, not a medical or legal determination. While the State might perhaps choose not to pay for *any* medical services for pregnancy, it cannot pay for

¹⁰ It bases this argument on the preamble to the Act, which describes the principal goal of title XIX as providing "medical assistance on behalf of . . . individuals, whose income and resources are insufficient to meet the costs of necessary medical services." 42 U.S.C. §1396 (1970).

¹¹ *Connecticut v. Menillo*, *supra*, holding that, while a state may not restrict a woman's decision to terminate her pregnancy, it *may* require that abortions be performed by competent personnel.

one form of treatment (*i.e.*, childbirth) and not for the other (*i.e.*, abortion).¹²

While participating states have considerable latitude in designing their Medicaid programs,¹³ they must exercise their discretion within statutory parameters. It is possible that Congress intended the states to choose the medical conditions they would cover and to decide whether a given treatment for such conditions was reasonably safe.¹⁴ Once these two preliminary decisions are made, however, the State has no further legitimate interest in restricting the mode of treatment for a Medicaid-authorized condition. Rather, as this Court explained in *Doe v. Bolton*,¹⁵ and reiterated in *Danforth*¹⁶ and *Bellotti*,¹⁷ such a choice must be made solely by physician and patient. The Medicaid statute nowhere prohibits disbursements of funds for abortion; absent such a statutory prohibition, the only congressional guidance as to reimbursable treatment is that the states must uniformly reimburse medical costs for all listed categories of health care received by eligible patients.¹⁸ Therefore, if the State will reimburse costs of "necessary" abortions and of live birth as constituting "medically necessary" responses to the condition of pregnancy, it must, under the statutory directive, also reimburse the

¹² *Planned Parenthood Assn. v. Fitzpatrick*, 401 F. Supp. 554, 581 (E. D. Pa. 1975).

¹³ 42 U.S.C. §§1396a(a) (10), (14) and (17), 1396d (a), (f) and (c) (1970).

¹⁴ 42 U.S.C. §§1396a(a) (17) and (30), 1396b(g) (1970).

¹⁵ 410 U.S. 179 (1973).

¹⁶ 44 U.S.L.W. 5197 (1976).

¹⁷ 44 U.S.L.W. 5221 (1976).

¹⁸ 42 U.S.C. §1396a(a) (10) (B), (C) (1970).

costs of elective abortions, as these constitute medical treatment necessary for a medical condition requiring treatment, just as do the other true categories.

A number of courts have joined the court below in recognizing this simple argument. In *Roe v. Norton*, for example, the court recognized that

[p]regnancy is plainly a physical condition which requires medical attention. The nature of the services to be rendered is a matter between patient and doctor. . . . The care and services rendered in [the case of either live birth or elective abortion] would be equally "necessary" if such a showing were required by Title XIX.¹⁹

Adopting this reasoning, the court below properly found that once a participating state has defined a condition for which treatment is "necessary," it is then up to the attending physician, not the State, to elect an appropriate treatment for the condition.²⁰

The term "medical necessity" as used herein focuses on whether a condition requires treatment, but the term's proper usage has been the source of considerable judicial confusion and has been interpreted in varying

¹⁹ 552 F.2d 928, 934 (2d Cir. 1975). Accord: *Klein v. Nassau County Medical Center*, 347 F. Supp. 496, 500 (E.D.N.Y. 1972); *Doe v. Rose*, 499 F.2d 1112, 1116, (10th Cir. 1974); *Coe v. Hooker*, 406 F. Supp. 1072, 1081 (D.N.H. 1976). While the *Klein* decision was vacated and remanded for reconsideration in light of *Roe* and *Doe*, 412 U.S. 924-25, the court's reasoning was so sound that it has been universally accepted, providing the underpinning of most of the Medicaid abortion decisions to follow.

²⁰ *Doe v. Beal*, 523 F.2d 611, 620 (3rd Cir. 1975).

ways. It is therefore worthy of some further treatment here. The question is how Congress intended the term to be defined. Since there is no evidence that Congress mandated a national definition, it is likely that it expected states to develop such standards on some rational basis, probably in conjunction with the medical profession.²¹ Courts have interpreted the term in the manner advanced by amici herein,²² but they have also interpreted it as limiting the *persons* eligible for Medicaid rather than the *conditions* for which Medicaid may be supplied.²³ Under either interpretation, however, several courts have held reimbursement of elective abortion costs to be mandatory.

Yet another interpretation of the term from the medical community itself also leads forcibly to a conclusion that title XIX mandates coverage of elective abortions. This definition considers "medically necessary" care to be that treatment which is responsive to the problem for which it is offered.²⁴ Under this defin-

²¹ The PSRO Law, 42 U.S.C. §1320c-1, enacted in 1972, delegates the function of setting standards for medical necessity and applying them for Medicaid patients to local groups of physicians. Although they will begin with inpatient hospital procedures, they will eventually review outpatient services as well.

²² See note 19 *supra* and accompanying text.

²³ E.g., *Roe v. Norton*, 380 F. Supp. 726, 728-29 (D. Conn. 1974), although the court also subsequently decided that once a state determines that a condition requires medical treatment, the choice of treatment can be made only by physician and patient. 380 F. Supp. at 729.

²⁴ For an application of this definition, see Bunker, *Elective Hysterectomy: Pro and Con*, 295 N. Eng. J. Medicine, 267 (1976).

ition, one must first identify the problem for which the medical care is offered and then determine whether it is a safe and effective treatment for the condition. If the condition is pregnancy, it is a condition universally recognized as necessitating medical treatment, although it is not a pathology.²⁵

Since pregnancy is a condition requiring medical attention, the second step is to determine whether abortion is a safe response to it at certain medically recognized stages. Neither the choice of live birth nor that of abortion can be considered "unnecessary" under this analysis, despite the fact that those treatments present different outcomes as a result of the treatment.

An analogous situation is presented by a diagnosis of kidney disease, where the choice of treatment is transplant or dialysis. Each choice produces significantly different outcomes with different effects on the patient's mental and physical health, but this by no means indicates that one choice is less "necessary" than the other. As it happens, this particular condition is one which would be reimburseable under the challenged state regulations regardless of which treatment for that condition the doctor and patient elected. While the choice of treatment would be predicated upon consideration of a number of individual factors known only to physician and patient, they would at least not be forced to give overriding consideration to an arbitrary State determination that one form of treatment was more

²⁵ *Klein v. Nassau County Med. Ctr.*, 347 F. Supp. 496, 500 (E.D.N.Y. 1972).

moral (*i.e.*, more "necessary" under a State definition of that term) than the alternative choice.

In *Doe v. Bolton*,²⁶ the tacit assumption that pregnancy is a condition requiring medical treatment lay at the heart of this Court's determination that the right to privacy includes the abortion choice. That case determined that the right of privacy does encompass this choice of method of treating pregnancy, a choice to be made by the woman with the advice and counsel of her physician. It is not for the states to substitute their judgment for that of a physician on the appropriateness of a given choice of treatment. If a physician's choice of treatment is in fact unethical, the physician should be left to be disciplined by his licensing board,²⁷ but the state may not make the blanket assumption that all abortions categorized by its regulations as "non-therapeutic" are in fact "medically unnecessary."

B. Congressional Intent In Enacting Medicaid Was Broad Enough To Encompass Any Medical Treatment, Then Legal Or Not, Which Might Be "Medically Necessary."

Petitioners herein argue that because elective abortions were illegal in most states when title XIX was enacted, the court below erred in holding that Congress could have required payment for such abortions. Brief of Petitioner at 13. Rather, Petitioners argue, the Act should be construed in light of conditions existing at the time of its passage. *Id.* at 14. In

²⁶ 410 U.S. at 192-93.

²⁷ 410 U.S. at 200.

fact, however, amici respectfully submit that congressional intent in enacting title XIX was clearly broad enough to encompass funding of any treatment which might be medically necessary, regardless of whether that treatment might have been considered necessary in 1965.

Why the existence in 1965 of laws invalid on their face should act as any kind of limitation on the scope of title XIX is not readily discernible. Furthermore, this argument overlooks the impact of the 1972 family planning amendments to the Medicaid law, which are by implication wide-sweeping and without limitation.²⁸ Also indicating that title XIX does not preclude Medicaid payments for non-therapeutic abortions is the fact that Congress has entertained, but refused to enact, two specific amendments to prohibit the use of federal Medicaid funds for abortion.²⁹ The history of congressional activity on abortion since 1965 makes it clear that when Congress has sought to exclude abortion from family planning programs, it has done so explicitly.³⁰

The legislative history of the 1972 family planning amendments does not mention an intent either to include

²⁸ 42 U.S.C. §§1396d (a) (4) (C) and 602 (a) (15) (1970).

²⁹ H.R. 3153, 93d Cong., 1st Sess. §198B. The bill became law, P.L. 94-48, without this provision. The Bartlett amendment to the 1974 H.E.W. Appropriations Bill would have prohibited using H.E.W. funds, including Medicaid, for abortions. Cong. Rec. S. 16832 (Daily Ed., Sept. 17, 1974).

³⁰ Such enactments are discussed at some length in *Roe v. Ferguson*, 515 F.2d 279, 283 (6th Cir. 1975), although that court considered such provisions indicative of congressional intent generally to **exclude** coverage of abortion under title XIX.

or exclude abortion as a family planning service.³¹ As evidence that the term *does* include abortions is the fact that other federal statutes have expressly exempted abortion for family planning programs,³² as well as the standard practice of public health experts of including abortions in their definition of family planning services.³³ Abortion is a viable method of handling contraceptive failure and meets family planning needs where contraception has not been used or provided. It is therefore necessary in a variety of circumstances.

If elective abortion is not available in the early stages of pregnancy, physicians may be forced to use alternative control methods for women for whom childbirth involves serious adverse health risks, despite the fact that health risks attendant to oral contraceptive use are increasingly recognized as greater than those involved in using an alternative contraception method with abortion as a backup.³⁴ The availability of abortion therefore expands physician freedom of choice among medically appropriate procedures in selecting the op-

³¹ S. Rep. No. 92-1230, 92d Cong., 2d Sess. 297 (1972).

³² E.g., Congress obviously felt abortion **could** be classified as a family planning service when it expressly exempted it from coverage under title VIII of the Public Health Service Act, 42 U.S.C. §300a(b) (1970).

³³ There is relatively uniform consensus among health care professionals that family planning services include such specific techniques as contraception, abortion, sterilization and treatment for infertility. Wallace, Goldstine, Gold & Inglesby, **A Study of Title XIX Coverage of Abortion**, *Am. J. Pub. Health*, 116-1120 (August 1972).

³⁴ **Report of the President's Commission on Population Growth and the American Future**, 103 (GPO 1972). One authority

timal treatment for individual patients, and regulations or statutes limiting this freedom are not constitutionally acceptable.³⁵

The Medicaid statute's failure to mention abortion cannot be considered evidence of congressional intent to exclude it, since the statute mentions *no* individual medical procedure, only the general service categories: e.g. physician, inpatient and outpatient, and nursing home services. The statute's omission of specific reference to abortion is therefore no more noteworthy than its failure to mention such treatment as dialysis or appendectomy.

Furthermore, it must be remembered that abortions to save the life (and, in some states, the health) of the mother *were* legal in 1965 and were being funded at that time. The State's assertion that the illegality in 1965 of abortions must bar their coverage under title

has stated that the best method of family planning is a perfectly safe, if not perfectly effective, contraceptive method with early termination of pregnancy available as a back-up. C. Tietze, **Induced Abortion: A Factbook, Reports on Population/Family Planning**, 1973. Sterilization is fully effective but is irreversible, and so unacceptable to some. E. Dunbar, **Sterilization, Foolproof Birth Control**, 22 (L. Lader, ed. 1972). The intrauterine coil is only partially effective and impossible for many women to retain. H. Edey, **Sterilization, Foolproof Birth Control**, *supra*, at 42. Contraceptive pills are effective, if properly used, but may produce adverse side effects in some women. *Id.*

³⁵ 44 U.S.L.W. at 5204-05, wherein this Court held that Missouri's flat prohibition of saline amniocentesis as an allowable abortion technique was unreasonable and arbitrary.

XIX is therefore an oversimplification of existing conditions. Restrictions on abortion which did exist in 1965 were, after all, unconstitutional invasions of the right to privacy, and should therefore not serve to freeze allowable treatment to those kinds of abortions permissible at that time. Rather, as the definition of legal treatment for any given condition expands, available funding should follow the state of the law. This should be true for any given medical procedure, whether it is elective abortion or treatment for some other condition.

Finally, it is agreed by all of the parties hereto that Medicaid leaves to the states the task of defining the "amount, scope and duration" of medical care.³⁶ This allows the states great latitude in electing whether or not to treat given conditions. It does not, however, indicate that the states are to freeze reimbursable modes of treatment to those available in 1965. If the states wish to refuse reimbursement for some treatment which is recognized as safe and effective by the medical community, their only option under this statute must be to refuse payment for *all* available modalities of treatment for a given condition — *i.e.*, their choice is limited to refusing to recognize a condition as one for which physician services are "medically necessary."

C. A Doctor's Decision To Perform An Elective Abortion Cannot Be Classified By The State As "Non-Medical" And Therefore Not "Medically Necessary."

The State has argued that when a physician de-

³⁶ 42 U.S.C. §§1396(a) (10), (14) and (17).

cides to recommend a "non-therapeutic" abortion, he is making a decision which is somehow non-medical, which he is therefore not professionally qualified to make, and which the State may preclude him from making. Brief of Petitioner at 18. While this argument is somewhat nebulous, it seems to focus on an assertion that physicians lack expertise "with respect to a patient's social and economic needs." *Id.* at 19. The challenged state regulations do, however, permit abortions which are made to preserve the "mental health" of the mother; considerations of mental health and "social and economic needs" hardly appear to be mutually exclusive. It is also difficult to explain why general practitioners are apparently qualified to make decisions regarding a patient's "social and economic needs," since few general practitioners have significant expertise in psychiatry or psychology. In addition, during the first trimester of pregnancy the State has no legal right to make such distinctions.³⁷ The distinction the State seeks to make is not clear, let alone made on a rational basis to protect the health of the pregnant woman.

In fact, physicians often choose one alternative treatment over another on the basis of such considerations as patient emotional stability and social and economic needs. While general practitioners may not be expertly trained to treat such needs, they have traditionally attempted to do so, and this Court has expressly recognized the validity of a doctor's selection of treatment for a physical condition which is heavily influ-

³⁷ *Roe v. Wade*, 410 U.S. at 163; *Planned Parenthood v. Danforth*, 44 U.S.L.W. at 5204-05.

enced by such factors. In *Doe v. Bolton*,³⁸ the Court assumed that physicians make an abortion decision based not only on physical, but also on emotional, psychological and familial factors, as well as the woman's age. A proper "medical" decision, considering all of these subjective factors, might not clearly appear necessary to preserve mental health, but could instead more clearly meet the patient's "social and economic needs."

Any attempt to perpetuate standards for "medically necessary" abortions which is premised upon this quagmire of subjective and tenuous distinctions between "medical" and "non-medical" decisions is both unwise and impermissible. Instead, such standards must allow reasonably wide physician choice of permissible treatment for any condition for which medical treatment is medically necessary. The State can participate no further in electing to reimburse or not to reimburse once it has recognized a given condition as requiring medical treatment.

Such a construction of title XIX does not force all physicians or all hospitals to perform abortions. Medicaid is a "vendor payment program," designed to reimburse providers of health care for services rendered to program beneficiaries. 42 U.S.C. §1396d(a) (1970). It will pay for health services if a recipient can locate a provider to treat her, but it does not guarantee the availability or accessibility of services. Thus, a finding that elective abortions must be reimbursed under Medicaid does not destroy individual physicians' free-

³⁸ 410 U.S. at 192-93.

dom of choice in electing whether or not to perform abortions at all.

D. This Court Is The Final Authority In Interpreting The Medicaid Statutes.

Appellants rely upon the Department of Health, Education and Welfare's [H.E.W.'s] interpretation of the question at issue herein, because H.E.W. has concluded that funding of elective abortions is permissible but not mandatory under the Medicaid statute. While approval from a regulatory agency charged with administering a particular program is entitled to weight from the courts, it is equally clear that where that administrative interpretation is not correct, it must be invalidated by the courts.³⁹ In *Vialpando v. Shea*, the United States Court of Appeals for the Tenth Circuit refused to accord any special weight to H.E.W.'s approval of a Colorado AFDC regulation, explaining that "[t]his principle [of according weight to agency opinion] is inapplicable when a departmental interpretation is inconsistent with controlling statute."⁴⁰

As was the case in *Vialpando*, H.E.W.'s interpretation of Medicaid requirements is inconsistent with the legislative intent and express wording of the statutes.

³⁹ *Vialpando v. Shea*, 475 F.2d 731 (10th Cir. 1973), *aff'd*, 416 U.S. 251 (1974); *Townsend v. Swank*, 404 U.S. 282 (1971); *King v. Smith*, 392 U.S. 309, 333 (1968); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

⁴⁰ 475 F.2d 731, 735 (10th Cir. 1973), citing *Townsend v. Swank*, 404 U.S. 282, 286 (1971).

It is therefore entitled to no special deference by this Court.

E. The State's Real Objections To Funding Elective Abortions Are Based On Philosophical, Not Legal, Grounds. Such Grounds Do Not Constitute A Permissible Reason For Refusing Medicaid Payments To Eligible Recipients.

In a political system founded on the belief in a marketplace of ideas, in which all views are tolerated, the State may not impose one philosophy to the exclusion of all others on its citizens. Our laws reflect these fundamental concepts, and the trial court in this case properly recognized that "the law does not represent itself as a moral code."⁴¹ The State's elimination of elective abortion from Medicaid eligibility represents an attempt to substitute semantics for meaningful legal standards, and must be recognized as a moral decision rather than a legal one.⁴² Such standards do not provide a rational basis for legislative classification within the parameters of title XIX.

The State's difficulty in establishing that its position is legal rather than moral is underscored by its argument that "medical necessity" can be equated to "economic" necessity. Asserting that "the touchstone of Pennsylvania's Medicaid program is medical necessity," the State reasons that it is compelled by limited re-

⁴¹ *Doe v. Wohlgemuth*, 376 F. Supp. 173, 179 (W.D. Pa. 1974).

⁴² *Coe v. Hooker*, 406 F. Supp. 1072, 1083 (D.N.H. 1976), citing *Klein v. Nassau County Medical Center*, 347 F. Supp. 496, 500 (E.D.N.Y. 1972); *Doe v. Westby*, 402 F. Supp. 140 (D.S.D. 1975).

sources to "generally limit its medicaid program to cover only the most urgently needed medical services." Brief of Petitioner at 11-12. This argument is ill-advised.

The weakness of this position is that Pennsylvania *does* fund what it terms "necessary" abortions, as well as all of the costs attendant to live birth. Accordingly, the argument that Pennsylvania's refusal to fund elective abortions has an economic basis simply makes no sense, since a first-trimester abortion must inevitably be less costly to the State than prenatal, live birth, and post-natal care. An elective abortion is at least no more expensive than a "therapeutic" abortion.⁴³

That the State relies on a claim of economic justification to support a position which causes it greater expense than the treatment it refuses to reimburse is by itself a clear indication that the reasons it states in support of its position are not its real reasons. Amici herein respectfully submit that whatever the State's moral position may be, it may not impose that ethos on all its citizens.

F. The State Has No Legitimate Interest In Refusing To Finance Elective Abortions.

⁴³ The weakness of this economic necessity argument has been recognized on several occasions by other courts "Certainly the denial of medical assistance does not serve the State's fiscal interest, since the consequence is that the indigent may then apply for prenatal, obstetrical and post-partum care and for prenatal support for the unborn child." *Klein v. Nassau County Medical Center*, 347 F. Supp. 496, 501 (E.D.N.Y. 1972). "We observe that in this situation the state pays a greater sum of money and clearly does not 'conserve limited state resources.'" *Planned Parenthood Assn. v. Fitzpatrick*, 401 F. Supp. 554, 580 (E.D. Pa. 1975).

The court below properly held that the "comparability section" of the Medicaid statute⁴⁴ requires equitable treatment of recipients whose physicians choose various modes of therapy for the same condition. Examining Medicaid's statutory language and purposes, the court concluded that, while the states have considerable latitude in designing their Medicaid programs to meet both beneficiary needs and state fiscal needs,⁴⁵ they must exercise that discretion within the confines of the statutory limitations.⁴⁶

In defining those limitations, the court interpreted 42 U.S.C. sections 1396a(a) (10) (B) and (C), which require that medical assistance available to eligible recipients cannot be "less in amount, duration or scope than the medical assistance made available to any other such individual." The court held that this language prescribes equality among Medicaid recipients and that restricting payment for abortion forces "pregnant women to use the least voluntary method of treatment, while not imposing a similar requirement on other persons who qualify for aid." 523 F.2d at 619. This judicial implication of a statutory "equal protection clause" is fully justified by the express wording of the statute, as evidenced by subsequent decisions which have also adopted this approach.⁴⁷ It is also noteworthy

⁴⁴ 42 U.S.C. §1396a (a) (10) (B) and (C) (1970).

⁴⁵ 523 F.2d at 616.

⁴⁶ *Id.* at 616-19.

⁴⁷ *Coe v. Hooker*, 406 F. Supp. 1072, 1082-84 (D.N.H. 1976); *Doe v. Westby*, 402 F. Supp. 140, 143 (D.S. Dak. 1975); *Doe v. Myatt*, No. 43-74-48 (D.N. Dak., Oct. 30, 1975).

that no subsequent decision has specifically rejected this approach.

There are no rational state grounds for refusal to reimburse elective abortions since the health risks of this procedure are not high enough to invoke state interest in preserving the life and health of the mother. If high risks attend any abortion, they accompany those abortions which the state currently *will* reimburse — the "medically necessary" abortions. In the case of elective abortion, however, the patient's health is not already impaired, and the attendant risks of such surgery are even less for her than for the patient undergoing ordinary childbirth.

The Medicaid program has as one goal the provision of medical care in "the best interests of the recipients." 42 U.S.C. section 1396a(a) (19) (1970). Since first-trimester abortion in fact entails *lower* health risks than delivery, an election of this alternative is solely a choice for physician and patient.⁴⁸ Under the guarantee of equality inherent in the Medicaid statutes and regulations, the State may not interfere with this decision.

⁴⁸ *Coe v. Hooker*, *supra*, 406 F. Supp. at 1081, citing *Roe v. Wade*, 410 U.S. 113, 149 (1973); *Doe v. Beal*, 523 F.2d 611, 622 (3rd Cir. 1975).

CONCLUSION

Title XIX mandates reimbursement of costs for treatment of any condition for which physicians' services are "medically necessary," once a state has elected to provide *any* medical services for that condition. The Medicaid program is a broad and flexible one, allowing reimbursement for modes of treatment not available at the time of the statute's enactment in 1965. State opposition to a form of treatment based solely on moral grounds, rather than on proper interpretation of the applicable statutes, cannot sustain that position.

In an analogous situation, this Court has held that such interests are not proper grounds for state regulation. In *King v. Smith*,⁴⁹ invalidating an Alabama regulation which restricted AFDC payments for children of "immoral" mothers, this Court reasoned that state restriction of welfare funding on moral grounds "plainly conflicts with federal law and policy." As no legitimate state interests other than moral one support the Pennsylvania policy challenged herein, the courts below properly held that this policy irreconcilably conflicts with title XIX.

On the basis of the foregoing arguments and authorities, the decision of the lower court should be affirmed.

Dated this tenth day of September, 1976.

⁴⁹ 392 U.S. 309 (1968).

Respectfully submitted,

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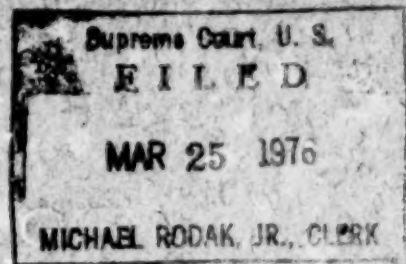
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No. 75-554

In the Supreme Court of the United States

OCTOBER TERM, 1975

FRANK S. BEAL, ET AL., PETITIONERS

v.

ANN DOE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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INDEX

	Page
Question presented	1
Statement	2
Discussion	4
Conclusion	12

CITATIONS

Cases:

<i>Dandridge v. Williams</i> , 397 U.S. 471	10
<i>Doe v. Bolton</i> , 410 U.S. 179	5, 11
<i>Doe v. Rose</i> , 499 F. 2d 1112	12
<i>Doe v. Westby</i> , 402 F. Supp. 140, appeal, docketed December 8, 1975, No. 75-813	12, 13
<i>Gerstein v. Coe</i> , 417 U.S. 279	3
<i>Jefferson v. Hackney</i> , 406 U.S. 535	10
<i>Richardson v. Belcher</i> , 404 U.S. 78	10
<i>Roe v. Ferguson</i> , 515 F. 2d 279	12
<i>Roe v. Norton</i> , 522 F. 2d 928	12
<i>Roe v. Wade</i> , 410 U.S. 113	6, 11
<i>United States v. Vuitch</i> , 402 U.S. 62	5

Constitution, statutes and regulations:

U.S. Constitution, Fourteenth Amend- ment	1, 3, 6, 9-10, 12
Social Security Act, Title XIX, 79 Stat. 343, as amended, 42 U.S.C. 1396 <i>et seq.</i>	1, 2
42 U.S.C. (Supp. IV) 1396	6, 7
42 U.S.C. 1396a(a)(8)	5
42 U.S.C. (Supp. IV) 1396a(a)(10) (A)	4
42 U.S.C. (Supp. IV) 1396a(a)(10) (B)	5

Constitution, statutes and regulations—Con.	
Social Security Act, Title XIX, 79 Stat.	
343, as amended—Continued	
42 U.S.C. (Supp. IV) 1396a(a)(10)	
(C) -----	4
42 U.S.C. (Supp. IV) 1396a(a)(13)	
(B) -----	5
42 U.S.C. (Supp. IV) 1396a(a)(17) -	5, 7-8
42 U.S.C. (Supp. IV) 1396a(a)(30) -	7
42 U.S.C. 1396a(b) -----	11
42 U.S.C. 1396c -----	11
42 U.S.C. (Supp. IV) 1396d(a)(1) -	
(5) -----	5
28 U.S.C. 2281 -----	3
45 C.F.R. 249.10(a)(1) -----	4
45 C.F.R. 250.18-250.20 -----	7

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MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This submission is made in response to the Court's invitation to the Solicitor General to file a brief expressing the views of the United States.

QUESTION PRESENTED

The United States will discuss the following question:

Whether Title XIX of the Social Security Act, 42 U.S.C. 1396 *et seq.*, or the Equal Protection Clause of the Fourteenth Amendment requires states that participate in the Medical Assistance Program ("medicaid") to pay for abortions that are not medically indicated.

STATEMENT

Respondents are women who are eligible for assistance under the medicaid plan established by the Commonwealth of Pennsylvania and funded by the United States under Title XIX of the Social Security Act, 79 Stat. 343, as amended, 42 U.S.C. 1396 *et seq.* During their pregnancies, respondents requested medicaid coverage for abortions. These requests were denied: Pennsylvania's medicaid plan limits financial assistance for abortions to those operations that are certified by physicians as necessary for the health of the woman or to prevent the birth of an infant with an incapacitating deformity or mental deficiency,¹ and respondents did not furnish the required certifications.

Respondents then instituted this suit for declaratory and injunctive relief in the United States District

¹ The Pennsylvania medicaid plan covers abortions in the following circumstances (Pet. App. 2a-3a, 63a-64a):

"1. There is documented medical evidence that continuance of the pregnancy may threaten the health or life of the mother;

"2. There is documented medical evidence that the infant may be born with incapacitating physical deformity or mental deficiency; or

"3. There is documented medical evidence that continuance of a pregnancy resulting from legally established statutory or forcible rape or incest, may constitute a threat to the mental or physical health of a patient;

"4. Two other physicians chosen because of their recognized professional competency have examined the patient and have concurred in writing; and

"5. The procedure is performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals."

Apparently the plan covers the cost of a preliminary examination by physicians to determine whether a patient is eligible under these requirements (Pet. App. 43a, n. 2).

Court for the Western District of Pennsylvania. They contended that the State's requirement of a certification of medical necessity before an abortion would be funded was in conflict with Title XIX of the Social Security Act and the Equal Protection Clause of the Fourteenth Amendment. A three-judge district court was convened pursuant to 28 U.S.C. 2281.

The district court concluded that Pennsylvania's limitation of coverage to abortions that are medically necessary did not contravene Title XIX. The court held, however, that the state restriction, as applied during the first trimester of pregnancy, does deny equal protection since it creates "an unlawful distinction between indigent women who choose to carry their pregnancies to birth, and indigent women who choose to terminate their pregnancies by abortion" (Pet. App. 39a; 376 F. Supp. 173, 191). The court granted a declaratory judgment that the abortion reimbursement provisions, as applied during the first 12 weeks of pregnancy, were unconstitutional (Pet. App. 50a-51a).

Petitioners appealed to the court of appeals from the award of declaratory relief; respondents cross-appealed from the denial of declaratory relief with respect to the second and third trimesters of pregnancy.² The court of appeals *en banc*, with three judges dissenting, held that Title XIX prohibits a participating state from requiring a physician's certi-

² Since respondents did not contest the denial of injunctive relief, the court of appeals had jurisdiction. See *Gerstein v. Coe*, 417 U.S. 279.

fication of medical necessity as a condition for funding during both the first and second trimesters of pregnancy (Pet. App. 83a-84a; 523 F. 2d 611, 621-622). In light of this disposition, the court found it unnecessary to address the constitutional question raised by respondents.

DISCUSSION

Title XIX of the Social Security Act establishes a Medical Assistance Program pursuant to which the states may provide federally-funded medical aid to the "categorically" and "medically" needy. As a prerequisite to federal funding under Title XIX, a state medicaid plan must provide financial assistance to the categorically needy³ with regard to five general categories of medical treatment: (1) inpatient hospital services, (2) outpatient hospital services, (3) other laboratory and x-ray services, (4) skilled nursing facility services, periodic screening and diagnosis of children, and family planning services, and (5) physician's services. 42 U.S.C. (Supp. IV) 1396a (a)(13) (B) and 1396d(a)(1)-(5).⁴

³ The "categorically" needy includes needy families with dependent children and the aged, blind, and disabled. 42 U.S.C. (Supp. IV) 1396a(a)(10)(A). The "medically" needy includes other needy individuals. 42 U.S.C. (Supp. IV) 1396a(a)(10)(C). See 45 C.F.R. 249.10(a)(1). Although the states need not extend medicaid coverage to the medically needy, Pennsylvania has chosen to provide the same benefits to all needy persons (Pet. App. 70a, n. 11).

⁴ Other benefits may be offered at the state's option, subject to the requirements that they be provided "with reasonable promptness to all eligible individuals" (42 U.S.C. 1396a(a)(8)) and be made available on the same basis to all eligible individuals (42 U.S.C. (Supp. IV) 1396a(a)(10)(B)).

The states are not required, however, to provide payment for every medical treatment falling within those five general categories. All the Act requires is that the state medicaid plan establish "reasonable standards * * * for determining * * * the extent of medical assistance under the plan which * * * are consistent with the objectives of [Title XIX]." 42 U.S.C. (Supp. IV) 1396a(a)(17). In our view, a state's determination to offer medicaid coverage for abortions only when such treatment is medically indicated⁵ is reasonable and is neither inconsistent with the objectives of Title XIX nor in violation of the Fourteenth Amendment.

1. The principal objective of Title XIX is the furnishing of "medical assistance on behalf of [certain families and individuals] whose income and resources are insufficient to meet the costs of necessary medical services." 42 U.S.C. (Supp. IV) 1396. No provision of

⁵ We use the term "medically indicated" to refer to medical treatments determined by the attending physician to be "necessary for the preservation of the patient's health," as this Court has construed like phrases in *United States v. Vuitch*, 402 U.S. 62, and *Doe v. Bolton*, 410 U.S. 179. In *Vuitch*, the Court determined that "'health' * * * includes psychological as well as physical well-being" (402 U.S. at 72). And in *Bolton*, the Court concluded (410 U.S. at 192): "Whether * * * 'an abortion is necessary' is a professional judgment that * * * may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient. All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment." Although the record does not reflect how the Pennsylvania scheme operates in practice, we assume that the requirement that there be "evidence that continuance of the pregnancy may threaten the health or life of the mother" (see note 1, *supra*) is the same as a requirement that the abortion be medically indicated.

the Social Security Act explicitly requires the states to pay the costs of abortions or of any other particular medical procedure. To the contrary, the language and legislative history of Title XIX indicate that Congress intended that the participating states would retain substantial flexibility in determining the extent, scope, and duration of medicaid coverage, subject only to the requirement of reasonableness and the other specific requirements of the Act. As the court of appeals observed (Pet. App. 79a):

Congress has no present intention of funding every procedure which falls within the legal practice of medicine. The states are given broad discretion to tailor their programs to their particular needs, and are required to economize and to fund only necessary medical expenses.

Accordingly, a state may properly restrict the coverage of its medicaid plan to the costs of necessary medical services. In particular, we consider it reasonable for a state to insist that the decision to have an abortion be informed by expert medical judgment (see *Roe v. Wade*, 410 U.S. 113, 164), and to limit funding to those abortions determined by a physician to be medically indicated. Such restricted coverage is consistent with the legislative objectives of "meet[ing] the costs of necessary medical services" (42 U.S.C. (Supp. IV) 1396; emphasis added) and "safeguard[ing] against unnecessary utilization of * * * care and services." 42 U.S.C. (Supp. IV) 1396a(a)(30). See also 45 C.F.R. 250.18-250.20. The limitation of a medicaid plan's coverage of abortions to situations in

which a physician has determined that the treatment is required for the patient's physical or emotional well-being therefore accords with the congressional intent and falls within the discretion granted the states under Title XIX.

It is true that the practical and emotional consequences of a failure to perform an abortion may be profound. However, the same may be said of the failure to perform medically feasible cosmetic surgery, yet a state presumably could reasonably determine not to cover the costs of such operations when they are not medically indicated. Furthermore, the experience of an abortion could have far-reaching and unforeseen consequences for the expectant mother's psychological health, and there would thus be special reasons for requiring the exercise of medical judgment before the state undertakes to provide a woman with a requested abortion.

The state's requirement of such an exercise of medical judgment is not so lacking in rationality as to be "unreasonable" for purposes of 42 U.S.C. (Supp. IV) 1396a(a)(17). Certainly a state is not required by Title XIX to provide financial assistance with respect to an abortion, or any other operation, merely upon the patient's own request.

a. In reaching the opposite conclusion, the court of appeals apparently reasoned that since Pennsylvania "has determined, in its discretion, that pregnancy is a condition for which medical treatment is 'necessary'" (Pet. App. 83a), any medically feasible treat-

ment of that condition must be covered by the state's medicaid plan. But even if the state is barred from intruding upon the choice of treatment, it may legitimately insist that that treatment be the product of a medical determination.

The court of appeals believed that the Pennsylvania regulations in fact interfere with the exercise of medical judgment (*ibid.*), but this appears to be a misperception of the state's eligibility requirements for financial aid for abortions. With a possible exception noted in the next paragraph, Pennsylvania expressly allows reimbursement of the costs of any abortion that has been determined by the attending physician to be medically indicated. See notes 1 and 5, *supra*.

b. The Pennsylvania medicaid plan has a feature, however, that was not discussed by the court of appeals but which may conflict with the Act. Pennsylvania apparently will not reimburse the costs of abortions that have been certified by the attending physician as necessary unless two additional physicians of "recognized professional competency" have examined the patient and have concurred in writing. See note 1, *supra*. Depending upon the interpretation of the state's regulations and their practical operation, this requirement may improperly intrude on the medical judgment of the attending physician in a manner contrary to what we believe to have been the intent of Congress.

The record is unclear, however, whether medicaid funding in Pennsylvania ever has been denied for an abortion certified by the attending physician to be

medically necessary because of the lack of concurrence of two additional physicians, and whether the role of the two additional physicians has been defined to require an independent determination of medical necessity or is limited to a diagnosis of whether the abortion would unduly endanger the woman's health. If this Court sustains Pennsylvania's requirement of a certification by the attending physician, the case may appropriately be remanded for consideration of the further requirement that two other physicians concur in the attending physician's judgment.

2. Pennsylvania's limitation of medicaid assistance to abortions that are medically indicated does not violate the Equal Protection Clause of the Fourteenth Amendment.⁶ For the reasons discussed above, that limitation satisfies the statutory requirement of reasonableness. By the same token, therefore, it also satisfies the rational basis test for equal protection. See, e.g., *Jefferson v. Hackney*, 406 U.S. 535, 546; *Richardson v. Belcher*, 404 U.S. 78, 81; *Dandridge v. Williams*, 397 U.S. 471, 486-487.

Respondents contend, however, that the limitation invidiously discriminates between "those who continue their pregnancies to birth and those who seek to terminate their pregnancies by abortion" (Br. in Opp. 6) and thus can be justified, if at all, only if it promotes "a compelling state interest" (*ibid.*). But the distinction Pennsylvania draws between abortion and

⁶ For the reasons stated in the immediately preceding paragraph in the text, we do not here discuss whether Pennsylvania's further requirement of concurrence by two additional physicians is constitutional.

childbirth, by requiring a certification by the attending physician in the former case and not in the latter,⁷ is not invidious; it merely reflects the fact that whereas medical treatment at childbirth is generally considered to be necessary, in some circumstances a physician might determine that an abortion would not be an appropriate medical treatment.

Presumably it was for this reason that this Court, in recognizing a qualified right to abortion, emphasized the critical importance of the attending physician's role by holding that during the first trimester "the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician." *Roe v. Wade*, *supra*, 410 U.S. at 164. See also *Doe v. Bolton*, *supra*, 410 U.S. at 192. Thus, Pennsylvania has acted responsibly as well as constitutionally by interposing a physician between the medicaid patient and the decision to abort.

Moreover, the fact that a woman has a qualified right to an abortion does not imply a correlative constitutional right to free treatment. Individuals presumably have a "right" to undergo many recognized medical procedures by a licensed physician, but the Equal Protection Clause does not affirmatively require a state to cover the costs incurred by indigents in undergoing such procedures.

⁷ Respondents incorrectly assert that Pennsylvania provides medicaid assistance "only to women who continue their pregnancies to childbirth" (Br. in Opp. 7). In fact, as we have noted above (p. 8, *supra*), the Pennsylvania medicaid plan covers the costs of abortions as well as of childbirths so long as the treatment provided satisfies the touchstone of medical necessity.

3. Because of the conflicting decisions of the lower courts and the substantial importance of the questions presented here to the federal government's oversight responsibilities under Title XIX,⁸ we believe that those questions warrant review by this Court. The Second and Sixth Circuits have held that Title XIX permits state medicaid plans to deny coverage of abortions that are not medically necessary. *Roe v. Norton*, 522 F. 2d 928, 935 (C.A. 2); *Roe v. Ferguson*, 515 F. 2d 279, 283 (C.A. 6). See also *Doe v. Rose*, 499 F. 2d 1112 (C.A. 10). These decisions conflict with the decision below on the statutory question petitioners raise.

Respondents contend, in opposing review, that "in cases in which federal courts have reached the constitutional claim, they, without exception, find such restrictions to be invalid on constitutional grounds" (Br. in Opp. 9).⁹ But that is not a basis for denying review in these circumstances. To the contrary, since one of the constitutional decisions upon which respondents rely, *Doe v. Westby*, 402 F. Supp. 140 (D. S.D.), appeal docketed December 8, 1975, No. 75-813, is now before this Court on direct appeal, considera-

⁸ The Secretary must approve any state medicaid plan that meets the requirements of the Act and is required to disapprove any plan that fails to satisfy those requirements. 42 U.S.C. 1396a(b). Furthermore, the Secretary is responsible for enforcing compliance with the mandatory terms of the Act and may terminate federal funding to any state that is found, after opportunity for hearing, to be in substantial violation of any provision. 42 U.S.C. 1396c.

⁹ The courts of appeals in *Norton* and *Ferguson* remanded those cases to the district courts for consideration of the constitutional issue.

tion of at least the statutory issue presented in the petition appears to be unavoidable.

CONCLUSION

For the foregoing reasons, the United States is of the view that neither Title XIX of the Social Security Act nor the Fourteenth Amendment requires a federally-funded state medicaid program to pay for abortions that are not medically indicated.¹⁰

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

ST. JOHN BARRETT,
Acting General Counsel,
Department of Health,
Education, and Welfare.

MARCH 1976.

¹⁰ Since both the statutory and constitutional issues are present in *Westby*, and since the Pennsylvania medicaid plan requires concurrence in the attending physician's judgment by two other physicians—a factor that may, as we have noted (see pp. 8-9, *supra*), complicate the statutory analysis—the Court may deem it appropriate to hold this case pending disposition of *Westby*.

SEP 20 1976

MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 75-554

FRANK S. BEAL, et al.,
Petitioners,

vs.

ANN DOE, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals
for the Third Circuit

~~MOFFET FOR SERVICE TO FILE BRIEF AMICUS CURIAE~~
and

BRIEF OF JANE DOE, AMICUS CURIAE

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September 20, 1976



SUBJECT INDEX

	Page
Motion to File Brief Amicus Curiae	1
Brief of Amicus Curiae	4
I. Argument	4
A. The Medicaid Program	4
B. State Restrictions on Medicaid Payment for Abortion	5
C. The Meaning of "Medically Necessary"	6
D. Permissible State Restrictions on Medicaid Services	8
E. Requiring a Physician's Certificate of Medical Necessity is Unconstitutional	10
II. Conclusion	13

TABLE OF AUTHORITIES

Cases

Ashwander v. T.V.A., 297 U.S. 288	8
Beal v. Doe, No. 75-554	2, 3, 7, 9, 13
Coe v. Hooker, 406 F. Supp. 1072 (D. N.H. 1976)	5, 7
Doe v. Bolton, 410 U.S. 179 (1973)	3, 6, 7, 10, 11, 12
Doe v. Myatt, No. 430-74-48, D. N.Dak., Oct. 30, 1975	5
Doe v. O'Bannon, No. 4-74-Civ., D. Minn., August 1, 1975	5
Doe v. Rose, 499 F.2d 1112 (10th Cir. 1973)	5

Doe v. Westby, 383 F. Supp. 1143 (D. S.Dak. 1974), vacated and remanded, 420 U.S. 968 (1975), opinion on remand, 402 F. Supp. 140 (D. S.Dak. 1975)	2, 5
Doe v. Wohlgemuth, 376 F. Supp. 173 (W.D. Pa. 1974), aff'd sub nom Doe v. Beal, 523 F.2d 611 (3d Cir. 1975)	7
King v. Smith, 392 U.S. 309 (1968)	4
Klein v. Nassau County Med. Ctr., 347 F. Supp. 496, rev'd and remanded for consideration in light of Roe v. Wade and Doe v. Bolton, 412 U.S. 924, remand decision, 409 F. Supp. 731 (E.D. N.Y. 1976), appeal docketed sub nom Toia v. Klein, No. 75-1749	7, 13
Maher v. Roe, No. 75-1440	2
Planned Parenthood Association v. Danforth, — U.S. —, 96 S.Ct. 2831 (1976)	8, 13
Planned Parenthood Association v. Fitzpatrick, 401 F. Supp. 554 (E.D. Pa. 1975), vacated and remanded, sub nom Beal v. Franklin, 44 U.S.L.W. 3758	5
Roe v. Ferguson, 389 F. Supp. 387 (S.D. Ohio 1974), rev'd, 515 F.2d 279 (6th Cir. 1975)	5, 7
Roe v. Wade, 410 U.S. 113 (1973)	5, 7, 8, 12
Smith v. Tinder, No. 75-0380CH, S.D. W.Va., Aug. 8, 1975	5
Toia v. Klein, No. 75-1749	3, 11, 12, 13
Townsend v. Swank, 404 U.S. 282 (1971)	4
Westby v. Doe, No. 75-813	1, 3, 11, 13

Statutes and Regulations

42 U.S.C. §600	4
42 U.S.C. §1380	4

42 U.S.C. §1396	4, 5, 6, 9
Missouri Revised Stat. §208.152 (12) (1973 Supp.)	5
Ohio Revised Code §5105.55(c)	5
Rule 280.210 of South Dakota Department of Social Services	5
Connecticut Welfare Department Public Assistance Program Manual, Vol. 3, Ch. III, §275	5
Louisiana Department of Public Welfare Memorandum No. 74-84 (June 17, 1974)	5

Secondary Authority

Bunker, "Elective Hysterectomy: Pro and Con," 295 New England Journal of Medicine 267 (1976)	7
Butler, "The Medicaid Program: Current Statutory Requirements and Judicial Interpretations," 8 Clearinghouse Review 7 (1974)	4
2 Family Planning/Population Reporter, pgs. 47-49, 80-81, 119 (1973)	5
3 Family Planning/Population Reporter at 34 (1974) ...	5
4 Family Planning/Population Reporter 113 (1975)	5
Stevens and Stevens, Welfare Medicine in America (1974)	4
Subcommittee on Oversight and Investigation of the Committee on Interstate and Foreign Commerce, "Cost and Quality of Health Care: Unnecessary Surgery" (1976) ..	7

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

and

BRIEF OF JANE DOE, AMICUS CURIAE

**MOTION OF JANE DOE FOR LEAVE TO FILE BRIEF
AMICUS CURIAE IN SUPPORT OF APPELLEES**

The National Health Law Program moves this Court for leave to file a brief amicus curiae in support of Appellees on behalf of Jane Doe and others similarly situated. Jane Doe is the named Plaintiff in *Westby v. Doe*, No. 75-813, on ap-

peal to this Court. She is a 28 year old resident of Pennington County, South Dakota, who receives Aid to Families with Dependent Children. The state officials who administer the South Dakota Medicaid Program refused to authorize payment for an abortion which she sought from her physician, resulting in litigation¹ of the same issues presented to this Court in *Beal v. Doe*, No. 75-554, and *Maher v. Roe*, No. 75-1440.

The National Health Law Program is a national Legal Services Corporation-funded support center whose responsibilities include: researching legal aspects of health problems of the poor, developing legal techniques to remedy these problems and providing assistance to legal services attorneys throughout the country, such as those at Black Hills Legal Services, and their poverty clients who have difficulty obtaining high quality health care services. In this capacity Program attorneys have participated generally in litigation to obtain benefits for Medicaid recipients to which they are entitled under federal law and specifically in several of the Medicaid abortion cases which are pending in federal courts throughout the nation. Jane Doe, as a client of Black Hills Legal Services and the National Health Law Program, represents the interests of Medicaid eligible women in the many states which restrict payment for abortion under Medicaid.

Jane Doe requests leave to file this brief to bring the Court an issue which is not fully addressed by the records in *Beal v. Doe*, No. 75-554, and *Maher v. Roe*, No. 75-1440, the cases which the Court has chosen to hear on the Medicaid abortion question. Amicus supports and concurs in all of Appellees' and Respondents' arguments and further urges the Court to determine fully the issue of to what extent a state may refuse

¹ *Doe v. Westby*, 383 F. Supp. 1143 (D. S.D. 1974), vacated and remanded, 420 U.S. 968 (1975); opinion on remand, 402 F. Supp. 140 (D. S.D. 1975), appeal docketed Dec 8, 1975, No. 75-813.

to pay under its Medicaid program for any abortions which the state deems not "medically necessary" or "medically indicated." Although the state's position in *Beal*, that it may limit Medicaid payment to those abortions necessary to save the mother's life or preserve her health, is completely inconsistent with this Court's decision in *Doe v. Bolton*, 410 U.S. 179 (1973), the position advanced by the Solicitor General in his brief, filed at the Court's request, on the state's petition for certiorari, suggests that a certificate of medical necessity may be required within the constraints of *Bolton*. The records in *Beal* and *Maher* do not reveal the effects of a certificate such as the Solicitor proposes, but the trial records in *Westby v. Doe*, No. 75-813, and *Toia v. Klein*, No. 75-1749, demonstrate the serious problems which the Solicitor's suggestion poses. Because the limits of the definition of medical necessity for purposes of Medicaid payment for abortion are at issue in several other federal district court cases, amicus urges this Court to resolve finally and completely the medical necessity question, which has caused physicians, state administrators and Medicaid recipients considerable confusion concerning the term "medically necessary" that has unduly interfered with Medicaid eligible women's right to obtain medical treatment from competent, ethical medical practitioners.

Petitioners and Respondents have consented to the filing of this brief. See Appendix herein.

BRIEF OF JANE DOE, AMICUS CURIAE

I. ARGUMENT

A. The Medicaid Program.

Funded jointly by the state and federal governments, the federal program of medical assistance for the indigent, "Medicaid", is a state-administered program which pays for the costs of medical care for most welfare recipients and certain other poor individuals.² 42 U.S.C. § 1396 *et seq.* States are not required to participate in Medicaid, but if they choose to do so, they must comply with the federal statutes and regulations which outline general program parameters. *Townsend v. Swank*, 404 U.S. 282 (1971), *King v. Smith*, 392 U.S. 309 (1968). Participating states must establish state plans which detail the groups of persons covered, types of services offered and conditions which providers of health care under the program must meet.

Federal law requires states to provide to recipients of the federal welfare programs (AFDC, 42 U.S.C. § 600 *et seq.*, and SSI, 42 U.S.C. § 1380 *et seq.*), the "categorically needy," at least seven basic services: physician services, X-ray and laboratory services, inpatient hospital services, outpatient hospital services, nursing home services, family planning services and early childhood health screening. 42 U.S.C. §§ 1396a(a)(10), (13)(B) and 1396d(a)(1)-(15). Just over half of the states also cover under Medicaid other poor persons who have too much income or resources to qualify for welfare, but who cannot afford health care and who are aged, blind or disabled or

² See generally, Butler, "The Medicaid Program: Current Statutory Requirements and Judicial Interpretations," 8 *Clearinghouse Review* 7 (1974), Stevens & Stevens, *Welfare Medicine in America* (1974).

dependent children within the meaning of federal law, the "medically needy", 42 U.S.C. § 1396a(10)(C). States covering the medically needy must provide either the basic seven services listed above or seven of the sixteen services listed in the Medicaid law, including some institutional and some non-institutional services, 42 U.S.C. § 1396d(a)(1)-(16). States may also provide virtually any other medical services such as drugs, eyeglasses or dental care, from this statutory list of optional services.

B. State Restrictions on Medicaid Payment for Abortion.

In response to this Court's 1973 *Roe v. Wade* and *Doe v. Bolton* decisions, 410 U.S. 113, 179, most states have repealed their plainly unconstitutional criminal prohibitions on abortions.³ But many states have adopted laws which limit access to abortion by prohibiting Medicaid payment for abortion or requiring that abortions be "therapeutic", "medically indicated" or "medically necessary",⁴ terms which are usually defined to be "a threat to the woman's life or health."

³ See, e.g., 2 *Family Planning/Population Reporter* 47-49, 80-81, 119 (1973).

⁴ See, e.g., *Id.*, 3 *Family Planning/Population Reporter* 34 (1974); 4 *Family Planning/Population Reporter* 113 (1975); Rule 280.210, South Dakota Dept of Soc. Serv., *Doe v. Westby*, 383 F. Supp. 1143, 1145 (D. S.D. 1974); Conn. Welf. Dept. Pub. Ass. Prog. Manual, vol 3, Ch. III, §275; Mo. Rev. Stat. §208.152(12) (1973 Supp.); La. Dept. Pub. Welf. Memo No. 74-84 (June 17, 1974); Ohio Rev. Code §5105.55(c). New Hampshire Regulations, see *Coe v. Hooker*, 406 F. Supp. 1072, 1076 (D. N.H. 1976); Utah policy, see *Doe v. Rose*, 499 F. 2d 1112, 1113 (10th Cir. 1973); Pennsylvania statute, see *Planned Parenthood v. Fitzpatrick*, 401 F. Supp. 554, 578 (E.D. Pa. 1975); Minnesota regulations, see *Doe v. O'Bannon*, No. 4-74-Civ., D. Minn. Aug. 1, 1975; North Dakota regulations, see *Doe v. Myatt*, No. 43-74-48, D. N. Dak. Oct. 30, 1975; West Virginia regulations, see *Smith v. Tinder*, No. 75-0380CH, S.D. W. Va., Aug. 8, 1975.

Many states justify such restrictions on the ground that the federal Medicaid law authorizes payment of federal funds for only services that are medically necessary, since the preamble to the Medicaid Act describes the principal object of the program to be paying for

“medical assistance on behalf of families with dependent children and of aged, blind or disabled individuals whose income and resources are insufficient to meet the costs of necessary medical services.” 42 U.S.C. § 1396.

Another provision of the Act permits states to set “reasonable standards . . . for . . . the extent of medical assistance available under the program,” 42 U.S.C. § 1396a(a)(17). This Court addressed the meaning of the term medically necessary in *Bolton*, where it was a corollary issue, and its language there does provide the foundation for resolving the confusion which surrounds the term. It will be seen that in the context of family planning decisions, the term “medically necessary” is constitutionally devoid of meaning. It is a red herring issue which states have used to camouflage their philosophical opposition to abortion.

C. The Meaning of “Medically Necessary.”

This Court faced the issue of what constitutes a medically necessary abortion in *Doe v. Bolton*, when it upheld a section of the Georgia statute which makes it illegal for a physician to perform an abortion unless it is “necessary” based on “his best clinical judgment,” 410 U.S. at 192-93. The Court assumed expressly that the physician would make a decision to abort based on physical, emotional, psychological and familial factors as well as the woman’s age. *Id.* By adopting this analysis, the Court seems to have accepted the proposition that there are “medically unnecessary” abortions, apparently those where the patient is not actually pregnant or where the above-listed factors are absent and the physician acts contrary to the patient’s best

interests. These comments, which of course did not interpret the requirements of the Medicaid statute, are apparently the source of some of the confusion on the medical necessity issue.

Underlying the Court’s determination in *Bolton* and *Wade* that the right to privacy includes the abortion choice, 410 U.S. at 155-63, 198-99, is the unspoken assumption that pregnancy is a condition that requires medical treatment. Two alternative choices of treatment are abortion and prenatal care plus delivery. It is this choice of treatment for the acknowledged medical condition which states have restricted and which the Court decided was protected by the constitutional right to privacy. However, the underlying condition of pregnancy, not the choice of treatment, determines whether medical attention is “necessary”.

A generally accepted definition of medical necessity is that care which is responsive to the problem for which it is being offered.⁵ To apply this definition to any procedure requires that one first identify the condition or diagnosis for which the medical care is being offered and then determine whether the care is safe and efficacious for the condition. Pregnancy is a condition which is universally recognized in our modern society to require medical attention, although it is not an illness or disease and although it may be voluntary.⁶ Therefore, once verifying that

⁵ For an application of this definition, see Bunker, “Elective Hysterectomy: Pro and Con,” 295 *New England Journal of Medicine* 267 (1976); cf. Subcommittee on Oversight and Investigation of the Committee on Interstate and Foreign Commerce, “Cost and Quality of Health Care: Unnecessary Surgery” (Jan. 1976).

⁶ *Klein v. Nassau County Medical Center*, 347 F. Supp. 496, 500-01 rev’d and remanded for reconsideration in light of *Wade* and *Bolton*, 412 U.S. 924; remand decision, 409 F. Supp. 731 (E.D.N.Y. 1976); *Roe v. Ferguson*, 389 F. Supp. 387, 392 (S.D. Ohio 1974), rev’d on other grounds, 515 F. 2d 279 (6th Cir. 1975); *Doe v. Wohlgemuth*, 376 F. Supp. 173, 190 (W.D. Pa. 1974), aff’d sub nom *Doe v. Beal*, 523 F. 2d 611, 620-22 (3d Cir. 1975); *Coe v. Hooker*, 406 F. Supp. 1072, 1082-83 (D. N.H. 1976). Cf. *Roe v. Norton*, 408 F. Supp. 660, 663, note 3 (D. Conn. 1975).

a patient is pregnant, to decide whether or not an abortion is necessary only requires determining whether it is a safe and efficacious response at certain medically recognized stages of pregnancy. Obviously abortion is such a response. Whether it is the appropriate choice for an individual woman is governed by the considerations enumerated by the Court in *Bolton* and is protected by the right to privacy.⁷ Neither the choice of abortion nor that of medical care and delivery can be considered "unnecessary" despite the existence of an alternative form of medical intervention, and despite the fact that those treatments appear to present different outcomes—a child or no child. Most forms of treatment for a given condition are designed to produce the same result, which may be why there is such reluctance to understand the foregoing analysis of the problem. However, viewed as medical care for the woman patient, both abortion and prenatal care plus delivery do produce the same result—a safe termination of the pregnant condition.

D. Permissible State Restrictions on Medicaid Services.

The Medicaid statute must be interpreted to conform to the Constitution, wherever possible. *Ashwander v. T.V.A.*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring).

Therefore, the foregoing analysis, which derives from constitutional principles, should govern the Court's reading of the Medicaid statute and its references to medical necessity. Under the postulated analysis, a state may generally limit services for which it pays under Medicaid services in three ways: First,

⁷ This Court's recent pronouncement on the extent of the right to choose abortion appears to indicate that the woman's interest in her health underlies the right to privacy. *Planned Parenthood v. Danforth*, — U.S. —, 96 S.Ct. 2831, 2840 (1976). However, the dissenting Justices, White, Burger and Rehnquist, correctly recognized that the right to choose abortion in *Wade* derives from the woman's interest in the effect of pregnancy upon her life. *Id.* at 2851-2852.

it may obviously limit services for which it pays under Medicaid to those which are safe and efficacious, e.g. 42 U.S.C. § 1396a(a)(30), 45 C.F.R. §§ 250.18, 250.19. To do so is "in the best interests of the recipients," 42 U.S.C. § 1396a(a)(19). The Court recognized in *Wade* that with respect to abortions, this important state interest begins in the second trimester of pregnancy, 410 U.S. at 163, and permits a state to limit the facilities where abortions are performed, *Id.*

Second, under the discretion provided in the Medicaid statute, 42 U.S.C. § 1396a(a)(10)(B), *Doe v. Beal*, 523 F.2d at 616 (3d Cir. 1975), a state may limit the conditions for which treatment will be provided at all, 523 F.2d at 620-21. Thus conditions which do not require medical attention, such as the shape of a nose, may be excluded from Medicaid treatment.

Finally, it is also possible that a state may limit a physician's choice of treatment for some conditions. It could, for example, refuse to pay for cosmetic surgery, which might be a physician's preferred choice of treatment for an emotional condition which a state might otherwise cover. *Doe v. Beal*, 523 F.2d at 620. However, when the condition is pregnancy, this Court has declared that the physician and patient's choice of treatment is protected by the Constitution from state interference absolutely during the first trimester, and that during the second trimester the state may only regulate the choice to protect the woman's health. 410 U.S. at 153-56. Therefore, regardless of whether a state may limit choice of treatment for some conditions, the Constitution prohibits it from imposing any choice of treatment for pregnancy.

The state's position in this case is that federal law permits states to limit reimbursement to those abortions which are necessary to save life or preserve health, because physicians should not "provide social and economic counseling". Petitioners' brief at 18. However, the state's position ignores this Court's deci-

sion in *Bolton* that physicians may consider social and familial factors in advising their patients on the appropriate course of treatment for pregnancy. The state's position also ignores the fact that the question of medical necessity arises when pregnancy is diagnosed, not when the physician and patient choose the treatment for pregnancy. Therefore, the Court must reject the state's position on medical necessity.

The Solicitor General's brief suggests a compromise position which has dangerous appeal because its impact was not explored or tested in the trial courts in *Beal* or *Maher*. The federal government argues that physicians may be required to certify that abortions are "medically necessary", as the term is defined in *Bolton*, but that the state may not look behind the certification once it is made. Solicitor General's brief at note 5, 7-8. As amicus will demonstrate, such a requirement would significantly impair the physician's and patient's constitutionally protected right to choose the appropriate treatment for pregnancy.

E. Requiring a Physician's Certificate of Medical Necessity Is Unconstitutional.

The Court's discussion in *Bolton* suggests that a state may require a physician to certify that an abortion is "necessary", as that term is defined to include physical, emotional, psychological and familial factors. Yet the Court's opinion also suggests that a state may not challenge such a certificate of medical necessity, because the physician is presumed to consider those factors and act in the patient's best interest. Failure to do so is punishable by discipline of the state licensing boards. 410 U.S. at 200.

Several states do require that physicians certify that an abortion is "medically necessary" in order to be paid for perform-

ing the procedure for Medicaid eligible women.⁸ The Solicitor General's brief approves this policy on the grounds that abortion requires the "exercise of medical judgment," brief at 7, and should "be the product of a medical determination," brief at 8. These remarks miss the thrust of the Court's express assumption in *Bolton* that physicians *do* make medical determinations and exercise medical judgment in advising patients about the choice of pregnancy treatment. In a footnote, the Solicitor General's brief does acknowledge that physicians should consider physical, emotional, psychological, familial factors and the woman's age, note 5, yet his subsequent arguments are inconsistent with this assumption.

Thus the Solicitor's brief begs the real question of the meaning of "medically necessary;" it argues for requiring physicians to execute a certification, but presumes that they will consider in their decisions all the factors which the Court declared in *Bolton* to be included in the term. Requiring a certificate which is presumed to derive from these factors and which a state may not challenge might seem to be a meaningless but harmless mandate. However, as the records in *Westby v. Doe* and *Toia v. Klein* demonstrate, such a requirement is confusing to administrators and physicians alike.

Some physicians, such as Jane Doe's physician in the *Westby* case, have their own definition of when a procedure is medically necessary, usually when a procedure is compelled by a threat to life or health. Yet they may prefer to apply a different standard to determine whether an abortion is in their patient's best interest. (Deposition of H. Benjamin Munson, M.D. in *Doe v. Westby*⁹) Requiring physicians to certify that an abortion is

⁸ *Supra* note 3.

⁹ When asked for his definition of "medically necessary" Dr. Munson replied:

Well, I would say a "necessary medical procedure"—I hardly ever use the word. I would say advisable, beneficial. Anything

medically necessary when that term is capable of several meanings has been demonstrated to inhibit physicians from performing abortions for Medicaid patients because they fear that the certificate may in fact be challenged or because they do not understand the term. See, e.g. Appellee's Motion to Affirm, *Toia v. Klein*, No. 75-1749, at 6-8.

Permitting states to impose this meaningless precondition of a certificate of medical necessity upon Medicaid abortion payment will continue to impair the physician-patient relationship and the physician's ability to prescribe the treatment of choice, both of which were guaranteed protection in *Bolton* and *Wade*. The requirement is thus quite pernicious and must be eliminated.

Other measures exist by which states can protect against the only types of "unnecessary" abortions which the Court implicitly recognized in *Bolton*: Those where the patient is not actually pregnant or where the physician acts contrary to the patient's express will or her informed judgment. To avert the problem of "abortional" acts upon women who are—negligently or intentionally—misdiagnosed as pregnant, states can and do license clinics, laboratories and physicians. To assure that the patient has freely participated in and concurs with the physician's decision, a state may require a written consent form, as this Court recognized last term in *Planned Parenthood Associa-*

that's necessary, without which a person will die, of course that's necessary. Anything without which a person will suffer a serious embarrassment of health, I think that could be called necessary. Beyond that, I suppose very few things are really necessary. (Deposition of H. Benjamin Munson, M.D., June 7, 1974, at 13).

With respect to the "necessity" of an abortion for Jane Doe, his patient, Dr. Munson said:

I think "necessary" is too strong of a word. No. I wouldn't say necessary, except in terms of preserving the reasonable health that she had, preserving it from depletion and overtiredness and the kind of things that would prejudice a person's general vitality. (*Id.* at 17.)

tion v. Danforth, — U.S. —, 96 S. Ct. 2831, 2839-2840 (June 29, 1976). By adopting these safeguards, a state can protect its legitimate interest that funds are not used to pay for fraudulent procedures or those where the woman does not consent to treatment.

II. CONCLUSION

The requirement that abortions be certified as medically necessary before they are eligible for Medicaid payment is unconstitutional because pregnancy has been acknowledged to be a condition requiring medical attention and the choice of how to terminate pregnancy—whether by abortion or delivery—has been held to be constitutionally protected from state interference until the point of fetal viability. The medical necessity question is answered once a state determines that a condition requires medical intervention or, at least, once a state determines that it will cover such conditions under its Medicaid plan. The term medical necessity has only a limited meaning in the context of pregnancy—to assure that pregnancy exists. The state may also assure that the woman concurs in the treatment decision. A certificate that an abortion is "medically necessary" is therefore meaningless, and might be innocuous were it not for the fact that imposing this meaningless and formalistic requirement has actually inhibited physicians from performing abortions upon consenting women for whom the physicians felt the procedure was in their best interest, as demonstrated by the record in *Toia v. Klein*.

Amicus urges the Court squarely to confront and dispose of this issue, although it is only indirectly raised by the parties in *Beal*, in order to avoid the necessity of further proceedings in *Westby*, *Klein* and other cases where the states' requirement inhibits the constitutionally protected interests of the physician

and patient to choose the most appropriate course of treatment for pregnancy.

Respectfully submitted,

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APPENDIX

Commonwealth of Pennsylvania
Office of the Attorney General
Harrisburg, Pa. 17120

September 7, 1976

Patricia Butler, Esquire
National Health Law Program
Le Conte Avenue
Room 640
Los Angeles, CA 90024

Re: Beal v. Doe,
No. 75-554

Dear Ms. Butler:

Pursuant to our phone conversation of this date I hereby consent to your participation as *amicus curiae* on behalf of the National Health Law Program in the above captioned matter.

If I can be of any further assistance, please do not hesitate to contact me at your convenience.

Best regards,

/s/ NORMAN J. WATKINS
Deputy Attorney General

NJW/pay

Neighborhood Legal Services Association

NEIGHBORHOOD LEGAL SERVICES ASSOCIATION

Office of the Director
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September 13, 1976

Patricia Butler
Attorney at Law
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10995 LeConte
Room 640
Los Angeles, CA 90024

RE: Beal v. Doe
No. 75-554

Dear Pat:

This is to confirm our agreement to permit you and Michael Wolff to file an amicus brief on behalf of the respondents in **Beal v. Doe.**

Sincerely yours,

/s/ JUDD CROSBY
Staff Attorney

JC/tr

cc: Michael Wolff, Esquire

FOR ARGUMENT

Supreme Court, U. S.
FILED

JAN 6 1977

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

October Term, 1976
No. 75-554

FRANK S. BEAL, Individually and as Secretary of the Department of Public Welfare, Commonwealth of Pennsylvania; ROGER CUTT, Individually and as Assistant Deputy Secretary for Medical Services, Commonwealth of Pennsylvania; GLENN JOHNSON, Individually and as Chief of the Bureau of Medical Assistance, Commonwealth of Pennsylvania; JAMES A. DORSEY, JR., Individually and as Executive Director of the Allegheny County Board of Assistance; and the DEPARTMENT OF PUBLIC WELFARE OF THE COMMONWEALTH OF PENNSYLVANIA,

Petitioners

vs.

ANN DOE; BETTY DOE, a Minor by Her Mother as Representative, MOTHER B. DOE; CATHY DOE; DONNA DOE, a Minor, by Her Mother as Representative, MOTHER D. DOE; ELAINE DOE; JANE DOE, a Minor by Her Father as Representative, FATHER J. DOE; NANCY DOE; PATRICIA DOE; RUTH DOE; SYLVIA DOE; and TONI DOE, Each Individually and on Behalf of All Other Women Similarly Situated,

Respondents

Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

	PAGE
REPLY BRIEF FOR PETITIONERS:	
Argument:	
I. Pennsylvania's medical necessity requirement as applied to abortion does not violate Title XIX	1
Conclusion	6

TABLE OF CITATIONS

CASES:

Bullock v. Carter, 405 U.S. 134, 141-2, n.17 (1971)	5
Bus Employees v. Missouri, 374 U.S. 74, 78 (1963)	5
Carroll v. Princess Anne, 393 U.S. 175, 178-9 (1968)	5
Doe v. Bolton, 410 U.S. 149 (1973)	2
Flemming v. Florida Citrus Exchange, 358 U.S. 153, 167-8 (1958)	5
McRae, et al. v. Matthews, et al., appeal pending sub nom. Buckley v. McRae 76-694	5
United States v. Vuitch, 402 U.S. 62 (1971)	2

OTHER AUTHORITY:

Webster's New International Dictionary (3d Ed., 1968)	4
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Argument

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ARGUMENT

I. Pennsylvania's Medical Necessity Requirement as Applied to Abortion Does Not Violate Title XIX

Medical Assistance coverage in Pennsylvania is extended to the reasonable costs of various medical services, including abortions. However, each such service must be medically necessary at the time it is utilized in order to be covered.¹ In this case, some of the respondents sought an abortion for reasons unrelated to health²—and therefore, were unable to obtain the required certification of the procedure's medical necessity. Respondents themselves, admitted that in some instances "... continuance of the pregnancy did not threaten the health

¹ For example, with respect to abortion, the Department of Public Welfare requires documentation "... that continuance of the pregnancy may threaten the health of the mother". (Petitioners' Br., p. 4)

² Other respondents appear originally to have been questioning only the Department's asserted failure to provide reimbursement for the medical examinations required by the regulations. This claim was never pursued on appeal, and, in fact was erroneous because the Pennsylvania Medicaid regulations clearly provided reimbursement for these examinations as any other necessary outpatient visit to a physician. M.A. Man. §9411 (Appendix I, Proc. Code 90080). Thus, Circuit Judge Weiss, dissenting in the District Court, correctly noted that "[t]he Commonwealth asserts that it does pay the fees of physicians to perform the preliminary examination and the contentions of the plaintiffs to the contrary appear to be in error." (108a)

or life of the mother.” (33a) ³ Nonetheless, they claimed a statutory right to an abortion, contending that Pennsylvania’s medical necessity requirement violated Title XIX.

However, respondents now apparently concede that a medical necessity restriction is permissible under Title XIX. In their brief they propose that if the petitioners “. . . acknowledge that the breadth of physicians’ discretion on the abortion decision is the same under Title XIX as the Court enunciated in [*United States v. Vuitch*, 402 U.S. 62 (1971) and *Doe v. Bolton*, 410 U.S. 149 (1973)]⁴, respondents concede that the state may legitimately interpose the attending physician between the woman’s desire to abort and the services.” (Respondents’ Br., p. 4) Thus, the respondents now appear to contend that Pennsylvania utilized an unduly restrictive definition of that which constituted a “medical necessity” for purposes of medicaid coverage for abortions.

There are several problems with respondents’ new approach. ⁵ First, even if Pennsylvania utilized an unduly

³ By agreement of the parties, this affidavit, submitted by respondents’ counsel, was accepted as true and admitted as evidence. (71a)

⁴ In *United States v. Vuitch*, this Court noted, in the context of a criminal abortion statute, that the term “health” necessarily included both physical and mental health. Similarly, in *Doe v. Bolton*, it was pointed out that the physician’s determination of the medical necessity of an abortion could be made in the light of a variety of factors: “. . . physical, emotional, psychological, familial, and the woman’s age—relevant to the well-being of the patient.” *Id.* at 192. The Court recognized that “. . . [a]ll these factors may relate to health”. *Id.*

⁵ Respondents have never before conceded the legality of a medical necessity standard under Title XIX. Nor have they

restrictive definition or application of the term “health”, which it does not,⁶ respondents themselves admitted that, at least in some instances, health considerations, however defined, played no part in their decision to seek an abortion. See n. 3 and text *supra*. Secondly, it was not the petitioners who refused to document the medical necessity of the procedure—but rather it presumably was the woman’s physician. Consistent with Title XIX it is the physician that determines the medical needs of the patient, not the Commonwealth.

Furthermore, the position which the respondents have now adopted is inconsistent with the reasoning of the lower Court. It was the majority’s view that the petitioners could not, consistent with Title XIX, place any medical necessity requirements on its coverage for abortion. Judge Van Dusen concluded that:

“Since the Commonwealth of Pennsylvania pays for full-term deliveries and also for therapeutic abortions, it is plain that the state has determined, in

ever questioned the petitioners’ use of the term “health”. Moreover, assuming that these women would have standing to question any restrictions the Commonwealth may have imposed upon the exercise of a physician’s discretion in determining if an abortion is medically necessary, they have not done so in this case.

⁶ The 1970 policy statement of the Pennsylvania Medical Society regarding abortion, which provided the basis for Pennsylvania’s regulations, clearly demonstrates the latitude of a physician’s discretion in this area: “If we take the example of an unwed pregnant female, the Pennsylvania Medical Society position well may permit an abortion to be performed if the three physicians specified agree that the female’s emotional reaction to the social stigma that may be attached to becoming a mother is such that it poses a threat to her mental health.” (81a)

its discretion, that pregnancy is a condition for which medical treatment is 'necessary' within the meaning of Title XIX. The next question is whether some justification can be found in the statute for preventing an attending physician from choosing nontherapeutic abortion as the method for treating a pregnancy. [Footnote omitted.] We can find none." (149a)

There simply is no room in that analysis for any medical necessity requirement as a prerequisite for funding abortions. An abortion which is "nontherapeutic" is, by definition,⁷ not medically necessary, regardless of the meaning ascribed to those terms. Otherwise the therapeutic-nontherapeutic distinction is meaningless. Accordingly, the lower Court's holding that Title XIX requires medicaid coverage for nontherapeutic abortions necessarily precludes the imposition of any medical necessity requirement, at least where abortions are concerned. Nevertheless, the respondents themselves have abandoned this holding and conceded, to the contrary, that Title XIX allows the States to "... legitimately interpose the attending physician between the women's desire to abort and the services". (Respondents' Br., p. 4)

In addition to respondents' own views on the question, recent actions by Congress cast further doubt on the validity of the opinion of the Court of Appeals. On September 30, 1976, Congress enacted the Departments of Labor and Health, Education and Welfare Appropria-

⁷ The term "therapeutic" is defined as, "[o]f or relating to the treatment of disease or disorders by remedial agents or methods: curative, medicinal". *Webster's New International Dictionary* (3rd ed., 1968).

tions Act for fiscal year 1977, p. 2.94-439, of which section 209 provides:

"None of the funds contained in this Act shall be used to perform abortions except when the life of the mother would be endangered if the fetus were carried to term."⁸

Although this evidence of Congressional disfavor with Medicaid funding abortions is not controlling, it is certainly another persuasive indicator that, *sub silentio*, Congress would not have *mandated* medicaid coverage for nontherapeutic abortions.

⁸ This appropriations act has not rendered this case moot, or in any way altered the issue in this appeal. First, Title XIX, the meaning of which constitutes the sole focus of this appeal, remains unchanged. Second, this appropriations act expires one year from its effective date. See *Bullock v. Carter*, 405 U.S. 134, 141-2, n. 17 (1971); *Flemming v. Florida Citrus Exchange*, 358 U.S. 153, 167-8 (1958). Third, the temporary nature of this measure, coupled with the fact that the Act has been enjoined nationally (*McRae, et al. v. Matthews, et al.*, appeal pending *sub nom. Buckley v. McRae* 76-694), makes this a case one which is, at the very least, capable of repetition yet evading review. *Carroll v. Princess Anne*, 393 U.S. 175, 178-9 (1968). In short, there still is "... the presence of an existing unresolved dispute which continues" *Bus Employees v. Missouri*, 374 U.S. 74, 78 (1963).

CONCLUSION

On the basis of the foregoing arguments and authorities, as well as those contained in the main brief for petitioners, it is respectfully requested that the opinion and order of the lower Court be reversed.

Respectfully submitted,
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